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## The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism

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# THE ALIEN-CITIZEN PARADOX AND OTHER CONSEQUENCES OF U.S. COLONIALISM

EDIBERTO ROMÁN\*

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## I. INTRODUCTION

Here at our sea-washed, sunset gates shall stand  
A mighty woman with a torch, whose flame  
Is the imprisoned lightning, and her name  
Mother of Exiles. From her beacon-hand  
Glows world-wide welcome; her mild eyes command  
The air-bridged harbor that twin cities frame.  
"Keep, ancient lands, your storied pomp!" cries she  
With silent lips. "Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!"<sup>1</sup>

—Emma Lazarus

The grand cause of all our present difficulties . . . may be traced . . .  
to so many *hordes of Foreigners* immigrating [sic] to America. Let us

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\* Associate Professor of Law, St. Thomas University. B.A., Lehman College, 1985; J.D., University of Wisconsin, 1988. This work is dedicated in loving memory to Carmen Hernandez. Thanks to Professors Kevin Johnson, Michael Olivas, Robert Westley, and Adeno Addis for their assistance and encouragement with this project and to Jodie Siegal, Eric Nelson, and Nicole Hessen for their invaluable research assistance. A very special thanks to Katerina Estrella Román for her inspiration, enthusiasm, and love.

1. EMMA LAZARUS, *The New Colossus*, reprinted in EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 48 (Morris U. Schappes ed., 3d. ed. 1967) (1883) (inscribed on the Statue of Liberty).

no longer pray . . . that America may become an asylum to all nations.<sup>2</sup>

American history is replete with paradoxes.<sup>3</sup> As the above quotes illustrate, American idealism purports to welcome the immigration of foreigners to this land, yet American behavior is consumed by expressions of fear over this very idea. This fear of foreign influx has not been limited to concerns over immigration<sup>4</sup> but has also been expressed by a constitutional doctrine that has marginalized the inhabitants of the United States territories.<sup>5</sup>

The territories came under U.S. sovereignty during the United States' late nineteenth- and early twentieth-century colonial expansion.<sup>6</sup> The United States annexed these distant islands, also known as insular territories, "without first seeking the consent of the native inhabitants" and without intending to incorporate the territories into the Union.<sup>7</sup> After these acquisitions, the pressing question became whether "the Constitution follows the flag,"<sup>8</sup> or in other words, whether the Constitution applied in all respects to the territories.

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2. JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 24 (amended ed. 2d prtg. 1967) (quoting letter from William Smith Shaw to Abigail Adams, in *Adams Papers VIII*, at 48 (May 20, 1798) (on file with the Massachusetts Historical Society)).

3. A paradox is a statement or sentiment that is seemingly contradictory or opposed to common sense and, yet, perhaps true in fact. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1636 (1993).

4. See generally Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997) (tracing the history of political discrimination against immigrants from the early alien and sedition laws to contemporary immigration reform efforts); Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV 111 (1996) (noting that the immigration reform debate is as much about race relations as it is about immigration); Paul Meehan, *Combatting Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389 (1997) (arguing that international human rights principles should become part of immigration reform debates). But see Rep. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883 (1997) (arguing that the Illegal Immigration Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, inspires confidence that future reform efforts will be guided by sound policy).

5. See Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 779 n.1 (1992).

The United States' territorial system consists of five island groups that fly the American flag but which are not states—Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. The United States also has special responsibilities for the Federated States of Micronesia, the Marshall Islands, and Palau.

*Id.*

6. See *id.* at 779-80.

7. *Id.*

8. Deborah D. Herrera, *Unincorporated and Exploited: Differential Treatment for Trust Territory Claimants—Why Doesn't the Constitution Follow the Flag?*, 2 SETON HALL CONST. L.J. 593, 593 (1992); accord Katz, *supra* note 5, at 780.

The U.S. Supreme Court answered in the negative.<sup>9</sup> This failure to grant inhabitants of the territories full constitutional rights created an inhabitant status with attributes of both alienage and U.S. citizenship.<sup>10</sup>

The anomalous status of the residents of Puerto Rico, one such U.S. territory, illustrates this alien-citizen paradox. While the citizens of the fifty states are granted citizenship by the U.S. Constitution,<sup>11</sup> the citizenship of the Puerto Rican people was statutorily established by the Jones Act of 1917,<sup>12</sup> based on birth in an unincorporated territory.<sup>13</sup> A House Report on the United States-Puerto Rico Political Status Act<sup>14</sup> described the limitations on Puerto Ricans' citizenship:

It is not equal, permanent, irrevocable citizenship protected by the Fourteenth Amendment. Puerto Ricans lack voting representation in Congress, and lack voting rights in presidential elections. Their rights of equal protection and due process have a different application than in the rest of the U.S., and Congress retains the right to determine the disposition of the territory.<sup>15</sup>

The territorial status of Puerto Rico coupled with the statutory grant of citizenship has served to subordinate Puerto Rican residents as compared to the citizens of the fifty states.<sup>16</sup> The alien-citizen paradox arises from the differential treatment of Puerto Rican citizens as inferior to first-class U.S. citizens. While the people of Puerto Rico are theoretically formal components of the body politic, in actu-

9. See generally *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Congress is not required to treat Puerto Rico uniformly for the purpose of duties, imposts, and excises, as it would the states); *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901) (holding that Puerto Rico is a U.S. territory and not a foreign country).

10. See *infra* Part III.A.

11. See U.S. CONST. amend XIV, § 1.

12. Ch. 145, 39 Stat. 951, 953 (1917) (codified as amended in scattered sections of 48 U.S.C.). Statutory citizenship continues under 8 U.S.C. § 1402 (1994).

13. See H.R. REP. NO. 105-131, pt. 1, at 33-34 (1997). For the purpose of this Article, the phrases "Puerto Rican people" and "people of Puerto Rico" refer to the native residents of Puerto Rico. Puerto Rico is a territory in the Caribbean Sea and is comprised of several islands. The territory has a population of 3.7 million. See *Puerto Rico Status Plebiscite, Joint Hearing Before the Subcomm. on Native Am. Insular Affairs of the Comm. on Resources, and the Subcomm. on the W. Hemisphere of the Comm. on Int'l Relations*, 104th Cong. 141 (1995) [hereinafter *Puerto Rico Status Plebiscite*] (statement of Jeffrey L. Farrow, Co-Chair of U.S. Interagency Working Group on Puerto Rico).

14. H.R. 856, 105th Cong. (1998).

15. H.R. REP. NO. 105-131, pt. 1, at 19 (1997) (statement of Rep. Young).

16. See, e.g., *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (holding constitutional the fact that recipients of Aid to Families with Dependent Children residing in Puerto Rico receive less assistance than do residents of the states based on an interpretation of the Territorial Clause of the U.S. Constitution).

ality they are viewed by many as non-English speaking people of color from a distant land—as outsiders.<sup>17</sup>

The recent treatment of Congressperson Luis Gutierrez by a Washington, D.C., security officer dramatically illustrates this point. After attending a Puerto Rican Affirmation Day tribute to the 743 Puerto Rican men killed and the 2797 Puerto Rican veterans wounded in the Korean War,<sup>18</sup> Representative Gutierrez, who is of Puerto Rican ancestry, was prevented from entering the nation's Capitol by a security officer. In addition to accusing Representative Gutierrez of presenting false congressional credentials, the officer shouted, "You and your people should go back to the country you came from."<sup>19</sup> While virtually unnoticed on the national level, the *Chicago Tribune* poignantly observed, "For Puerto Ricans, it is a peculiar part of the American experience to be treated as a foreigner in your own land. To be told with scorn to go back to your own country, when you're already there."<sup>20</sup> Representative Gutierrez's incident is an ironic and yet classic example of the offensiveness and absurdity of the alien-citizen paradox. At the footsteps of the U.S. Capitol, a police officer essentially directed a U.S. Congressperson to go back to the United States.

The paradoxical status of the Puerto Rican people is also illustrated by the following statement of Congressperson José Serrano, who was born in Puerto Rico:

What we have is a situation where I find on so many occasions that half, if not more, Members of Congress have no understanding whatsoever of the relationship . . . asking me on my next trip to Puerto Rico to bring them back coins for their collection, stamps for their collection . . . [A]t my father's funeral . . . someone said to me, why is the American flag on your father's casket. I said, he wanted it that way; he served in the Army . . . [H]e came back to me and said, . . . I had no idea that the Puerto Rican Army used the American flag.<sup>21</sup>

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17. See Gina Lubrano, Opinion, *Don't Know Much About Geography*, SAN DIEGO UNION-TRIB., May 27, 1996, at B7 (responding to a previous article that "referred to Puerto Rico as being among those 'other nations'").

Baseball, that great American pastime, is becoming an international game, according to a Sports section headline last Monday. A story pointed out that about 120 major league players developed their playing skills "in other nations." It was an interesting premise, but a seriously flawed one. The story referred to Puerto Rico as being among those "other nations."

*Id.*

18. See David Jackson & Paul de la Garza, *Rep. Gutierrez Uncommon Target of a Too Common Slur*, CHI. TRIB., April 18, 1996, § 1, at 1; see also Alex Garcia, *One Day at the Capitol*, HISPANIC BUS., June 1996, at 112.

19. Garcia, *supra* note 18, at 112.

20. Jackson & de la Garza, *supra* note 18, at 1.

21. *Puerto Rico Status Plebiscite*, *supra* note 13, at 10-11 (statement of Rep. Serrano).

The citizenship status of the alien-citizens is further evidenced by the words of the same Congressperson:

I can't for the life of me continue to understand why, if tomorrow, I was to leave Congress and return to Puerto Rico, I would not be able any longer to vote for the President that I voted for in the last election or for any candidate for President; that if I chose to be involved in politics in Puerto Rico and became its representative to Congress, I would not have the same voting privileges, voting rights that I have now; or the fact that so many of my cousins on my father's side, who never arrived in New York, never had the same kind of citizenship that all my cousins on my mother's side who came to New York had.<sup>22</sup>

Despite the fact that the inhabitants of Puerto Rico are subordinated U.S. citizens, equality is one of the great ideals of American culture.<sup>23</sup> As part of this ideal, Americans have historically embraced the principle of equal citizenship.<sup>24</sup> Kenneth Karst described the doctrine as a basic tenet of constitutional law: "Under that principle, every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member."<sup>25</sup> Accordingly, the doctrine "forbids the organized society to treat people as members of an inferior or dependent caste, or as non-participants."<sup>26</sup> Notwithstanding this noble and egalitarian ideal, American history is replete with instances when it has tolerated, and at times endorsed, the subordination of people.<sup>27</sup> Americans have long talked about freedom and equality as universal rights, yet have denied people those rights at various points in history.<sup>28</sup> Americans have succeeded in living with the incongruity between their ideals and their behavior by defining their community in a way that ex-

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22. *Id.* at 10 (statement of Rep. Serrano). Despite the anomalous status that Representatives Gutierrez and Serrano address, few Hispanics who were questioned about the incidents would be surprised "given the state of race relations and the anti-immigrant mood against Hispanics [in the United States]." Jackson & de la Garza, *supra* note 18, at 28. Unfortunately, the hurtful, humiliating, and belittling treatment of the alien-citizen occurs everyday to many less prominent Puerto Ricans and goes unnoticed. *See id.*

23. *See generally* Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983) (arguing that America's moral ideal of equality has not always been apparent in practice but remains, nonetheless, essential to American rhetoric).

24. *See* Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 1 (1988) (noting that the principle was most evident after the Civil War when the abolition of slavery was at the forefront of American politics).

25. *Id.* (evaluating the plight of the poor in America and their relationship to the constitutional ideal of equality).

26. *Id.*

27. *See generally id.* at 8-18 (discussing recent examples of economic and social subordination of African Americans, children, women, and the poor).

28. *See* Eric Foner, *Bondage, Freedom & the Constitution*, 17 CARDOZO L. REV. 2113, 2113 (1996) (noting that the American conception of "freedom" is based, in part, on the institution of slavery).

cludes the subordinated groups.<sup>29</sup> This Article tells the story of one of these excluded groups, the Puerto Rican people, and posits a solution to their subordinated condition.

On February 27, 1997, nearly 100 years after the annexation of Puerto Rico, Representative Donald Young of Alaska reintroduced the United States-Puerto Rico Political Status Act<sup>30</sup> for the purpose of ending the unequal status of the Puerto Rican people.<sup>31</sup> When the United States officially took control of the territory on October 18, 1898, General Nelson Miles, commanding officer of the invading forces, promised not "to make war upon the people [of Puerto Rico, but] . . . to bestow upon [them] the immunities and blessings of the liberal institutions of our Government."<sup>32</sup> Representative Young's bill was introduced nearly 100 years later "for the purpose of delivering on the promise of General Miles' pronouncement."<sup>33</sup>

This Article examines the United States' 100-year-old failed promise. In addition to detailing the unequal citizenship status of the people of Puerto Rico, this Article examines the role that racial and ethnic-based prejudice has played in this issue.<sup>34</sup> Essentially, this Article seeks to compare the traditional legal and political rhetoric of American inclusiveness and the virtues of U.S. citizenship to the reality of colonialism and the impact white supremacy has had on U.S. colonial history. By addressing the subordinated status of "alien-citizens," this Article illustrates the incompatibility of equality under colonialism. As Congress addresses the question of Puerto Rico's status once again, it is vitally important that issues relating to racial and ethnic prejudice are not forgotten.

Part II of this Article addresses the role and importance of U.S. citizenship and identifies the inequality of rights held by the people of Puerto Rico. Part II also explains the constitutional basis for the

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29. See Karst, *supra* note 24, at 2.

30. H.R. 856, 105th Cong. (1997) (including procedures for a referendum and congressional action to decide whether Puerto Rico should become a new U.S. state).

31. See H.R. REP. NO. 105-131, pt. 1, at 12-14 (1997).

32. DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 55 (Office of the Commonwealth of Puerto Rico ed., 2d ed. 1964) [hereinafter DOCUMENTS].

33. H.R. REP. NO. 105-131, pt. 1, at 12 (1997).

34. The people of Puerto Rico consist of the descendants of native Arawak and Taino tribes who migrated from the South American Antilles and settled the island over several centuries. See generally Francisco Moscoso, *Chieftdom and Encomienda in Puerto Rico: The Development of Tribal Society and the Spanish Colonization to 1530*, in THE PUERTO RICANS: THEIR HISTORY, CULTURE, AND SOCIETY 3-24 (Adalberto López ed., 1980) (tracing the earliest evidence of tribes migrating from Venezuela to the Antilles as early as 15,000 B.C.E., as well as the eventual migration of the Arawak to the Antilles and their integration with Taino settlers who came by canoe to the island). The Spanish imperialists began colonizing in the early 16th century and eventually introduced African slaves to Puerto Rico. See Adalberto López, *The Evolution of a Colony: Puerto Rico in the 16th, 17th and 18th Centuries*, in THE PUERTO RICANS: THEIR HISTORY, CULTURE, AND SOCIETY 26 (Adalberto López ed., 1980). Thus, today the Puerto Rican people are an amalgam of native Arawak and Taino, Africans, and Spanish imperialists.



distinctions between traditional Fourteenth Amendment U.S. citizenship and citizenship subject to congressional legislation. Part III tells the story of the Puerto Rican people. Part IV traces the evolution of the alien-citizen paradox and advances an explanation for its development. Finally, Part V examines the reasons why the alien-citizen paradox has fallen outside traditional race-related legal scholarship and posits solutions to end the paradox.

## II. CITIZENSHIP AND ITS IMPORTANCE

Typically, U.S. citizenship is obtained by birth within the United States (*jus soli*), by being born to an U.S. citizen (*jus sanguinis*), or by naturalization.<sup>35</sup> While the notion of automatic citizenship, such as citizenship by birthright, has existed since colonial times, the right of citizenship was reaffirmed by the U.S. Constitution.<sup>36</sup>

The original Constitution of 1798 contained several provisions addressing citizenship, but it did not define the term.<sup>37</sup> Article I empowered Congress to "establish an uniform Rule of Naturalization."<sup>38</sup> In 1790 Congress enacted the first naturalization act that determined which persons born outside the United States could become citizens.<sup>39</sup>

The U.S. citizenship acceptance process, however, was less than uniform. In *Scott v. Sandford*,<sup>40</sup> the Supreme Court held that the rights under the Constitution were accorded to citizens, and that citizenship afforded membership in the political community.<sup>41</sup> Nevertheless, the Court concluded that "negroes" were something less than

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35. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649, 664 (1898) (holding that a child born in the United States to non-citizens was a U.S. citizen). See also PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT* 9 (1985); JOHN S. WISE, *A TREATISE ON AMERICAN CITIZENSHIP* 51-66 (Fred B. Rothman & Co. 1980) (1906); Robert J. Shulman, Comment, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 691 (1995).

36. See U.S. CONST. amend. XIV, § 1. While citizenship by birthright is a long-standing means of acquiring citizenship status, seekers of immigration restrictions have proposed that children born to illegal aliens should be denied U.S. citizenship. See Kevin R. Johnson, *Racial Hierarchy, Asian American and Latinos as "Foreigner," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 348 (1997) (referring to the proposal of Peter Schuck and Robert Smith in their book *Citizenship Without Consent*).

37. See U.S. CONST. art. I, § 2, cl. 2 (stating that a member of the House of Representatives must have been "a Citizen of the United States" for seven years); U.S. CONST. art. I, § 3, cl. 3 (stating that a Senator must have been "a Citizen of the United States" for nine years).

38. U.S. CONST. art. I, § 8, cl. 4.

39. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103-04 (repealed 1795) (providing that a "free white person" could apply for citizenship after two years of residency in the United States).

40. 60 U.S. (19 How.) 393 (1857) (*Dred Scott*).

41. See *id.* at 404.

citizens.<sup>42</sup> The Supreme Court's discretionary application of citizenship status paved the way for the Court's subsequent sanction of differential treatment of other would-be citizens.<sup>43</sup> Partially in response to the *Dred Scott* decision, the framers added section one of the Fourteenth Amendment to the U.S. Constitution.<sup>44</sup> The first sentence of the Fourteenth Amendment provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."<sup>45</sup> This Amendment became the constitutional basis for the citizenship status of all Americans, except for the citizens inhabiting U.S. territories, such as the people of Puerto Rico.

Citizenship status, therefore, theoretically determines the rights available to an individual under the jurisdiction of the U.S., as well as their place in the American political community.<sup>46</sup> The significance of citizenship, however, reaches beyond certain delineated rights, one of the most important of which is the right to suffrage.<sup>47</sup> Chief Justice Warren described citizenship as "that status, which alone, assures [one] the full enjoyment of the precious rights conferred by our Con-

42. See *id.* at 411. The *Dred Scott* Court reasoned that African Americans had not been granted citizenship by the Constitution at the time of its framing because they were regarded as "beings of an inferior order" and thus not part of "the people" as defined in the Constitution. *Id.* at 407-08. In a purported effort to rectify the wrong created by *Dred Scott*, the Fourteenth Amendment was enacted in 1868. The Fourteenth Amendment was intended to "protect people of all races against unfortunate actions." Shulman, *supra* note 35, at 694. The Civil Rights Act of 1866 also effectively overruled the *Dred Scott* decision by declaring: "[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States . . . ." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (1994)). The statute, however, contains a xenophobic reference to Native Americans: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." *Id.*

It is ironic that the Fourteenth Amendment was enacted to end racism specifically against African Americans, but is currently being used by the proponents of the "color-blind society" to eradicate remedial programs such as affirmative-action. See, e.g., Pete Wilson, Commentary, *California Fair Play*, WASH. TIMES, Mar. 19, 1998, at A19 (arguing that race-based and gender-based preferences in awarding government contracts violate the Fourteenth Amendment).

43. See *infra* Part III.A.; see also Jonathon C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and the Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J., 667, 700 (observing that the same arguments employed in *Dred Scott* were used in the *Insular Cases* in order to deny birthright to territorial residents); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 958 n.288 (1991) (noting that the *Insular Cases* established a "framework of second-class status for overseas territories").

44. See *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) (stating that the primary reason to amend the Constitution was to overrule *Dred Scott*).

45. U.S. CONST. amend. XIV, § 1.

46. See Drimmer, *supra* note 43, at 667-68.

47. See, e.g., Kiyoko Kamio Knapp, *The Rhetoric of Exclusion: The Art of Drawing a Line Between Aliens and Citizens*, 10 GEO. IMMIGR. L.J. 401, 412 (1996) ("Historically, the privilege of participating in the democratic decision-making process has constituted the essence of citizenship.").

stitution."<sup>48</sup> Justice Brandeis once recognized its importance by declaring that the loss of citizenship was equivalent to the loss of everything that "makes life worth living."<sup>49</sup> Meanwhile, Chief Justice Rehnquist recently stated: "In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence."<sup>50</sup>

Citizenship, therefore, involves more than the right "to go to the seat of government;" it also includes "the sense of permanent inclusion in the American political community in a *non-subordinate condition*, in contrast to the position of aliens."<sup>51</sup> The label "citizen" is "applicable only to a person who is endowed with *full* political and civil rights in the body politic of the state."<sup>52</sup> Thus, citizenship signifies an individual's "full membership" in a political community where the ideal of equality is supposed to prevail.<sup>53</sup> For aliens or other outsiders, however, equality has been unattainable.<sup>54</sup> Because "[e]quality and belonging are inseparably linked,"<sup>55</sup> to acknowledge citizenship means to formally confer "belonging" to the United States.<sup>56</sup> This notion of citizenship encourages the creation of a bond or sense of social inclusion between the members of a political community.<sup>57</sup> Thus, citizenship fosters the construction of a shared national identity,<sup>58</sup> and

48. *Perez v. Brownell*, 356 U.S. 44, 78 (1958) (Warren, C.J., dissenting) (stating that voting in a foreign election does not constitute a "voluntary abandonment of citizenship").

49. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

50. *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting).

51. JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 5 n.12 (1979) (emphasis added); accord Siegfried Wiessner, *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 *MISS. L.J.* 447, 448-49 (1986) ("The relationship theory [of citizenship] views nationality as a legal bond between an individual and his home state that encompasses, by necessity, specific rights and duties.").

52. 3 *GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW* 1 (1942) (emphasis added).

53. *But see supra* note 42.

54. *See* Karst, *supra* note 24, at 3. Unlike citizens with formal recognition of membership in the political community, aliens are outsiders to the national community. For immigration purposes, the term "alien" refers to "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1994). Though aliens may live in this country for many years and "have deep community ties in the United States, noncitizens remain aliens, an institutionalized 'other,' different and apart from 'us.'" Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 *U. MIAMI INTER-AM. L. REV.* 263, 264 (1997). Accordingly, the label "alien" calls attention to one's "otherness." *See* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 *UCLA L. REV.* 1425, 1428 (1995).

55. Karst, *supra* note 24, at 3.

56. *See* Drimmer, *supra* note 43, at 667.

57. *See id.*

58. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 438 (1982) (holding that "citizenship is . . . a relevant ground for determining membership in the political community"); Drimmer,

American society has used citizenship to strengthen a "sense of national community by making those who are citizens feel especially good about their status."<sup>59</sup>

*A. The Unequal Status of the People of Puerto Rico*

The people of Puerto Rico "belong" to American society only in the sense that they have effectively remained possessions of the United States.<sup>60</sup> Through the 1917 grant of U.S. citizenship,<sup>61</sup> these people of "the empire forgotten" appeared to approach incorporation into the body politic, but in actuality were never afforded full or "equal" constitutional citizenship.<sup>62</sup> The people of Puerto Rico are not full U.S. citizens because they do not share the same rights held by other U.S. citizens: they are a disenfranchised people with limited citizenship status.<sup>63</sup> As inhabitants of a territory, their representation in Congress is limited to one non-voting member of the House of Representatives.<sup>64</sup> They cannot vote for the President or the Vice President, and their laws and status come under the plenary authority of Congress.<sup>65</sup>

In addition to their inability to participate in the national political process, the people of Puerto Rico are not entitled to the full complement of civil rights available to those with constitutionally granted citizenship. The citizenship rights of the people of Puerto Rico come not from the constitutional authority under the Fourteenth Amendment, which is the traditional basis for citizenship for those born or naturalized in the United States, but from the Territorial Clause of the U.S. Constitution.<sup>66</sup> Under this clause, Congress had the author-

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*supra* note 43, at 667 (asserting that citizenship signifies membership in a political community and binds both citizens and state).

59. Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People": A Review Essay on Citizenship Without Consent*, 76 OR. L. REV. 233, 236 (1997).

60. Spain formally ceded Puerto Rico, Cuba, and the Philippines to the U.S. in December 1898. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

61. See Jones Act of 1917, ch. 145, 39 Stat. 951 (1917) (codified as amended in scattered sections of 48 U.S.C.).

62. See Ediberto Román, *Empire Forgotten: The United States' Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1119 (1997) (arguing that the United States has refused to acknowledge its imperialist role while treating Puerto Rico as a colony).

63. See H.R. REP. NO. 105-131, pt. 1, at 49 (1997) (statement of Rep. Gutierrez).

64. See General Accounting Office, *U.S. Insular Areas: Applicability of Relevant Provisions of the U.S. Constitution*, GAO/HRD-91-18 (June 20, 1991), in 3 PUERTO RICO: POLITICAL STATUS REFERENDUM 1989-1991, at 471 (P.R. Fed. Affairs Admin. ed., 1992).

65. See *Harris v. Rosario*, 446 U.S. 651 (1980) (holding that the lower level of Aid to Families with Dependent Children reimbursement provided to Puerto Rico did not violate the Fifth Amendment's equal protection guarantee).

66. See U.S. CONST. art. IV, § 3, cl. 2. Congress has the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.*

ity to implement the Treaty of Paris,<sup>67</sup> which provided the United States with the power over the "civil rights" and "political status" of the inhabitants of Puerto Rico.<sup>68</sup> Consequently, the U.S. citizenship of the people of Puerto Rico is a legislated and colonial concession, not a constitutionally derived right, and it can be revoked altogether.<sup>69</sup> Unlike other U.S. citizens, who by virtue of the Fourteenth Amendment cannot be stripped of their full citizenship status,<sup>70</sup> the people of Puerto Rico are merely statutory citizens.<sup>71</sup> Unlike Fourteenth Amendment citizens, the people of Puerto Rico are similar to aliens because they are "partial members of the community with limited membership rights," subject to congressional revocation of their citizenship status.<sup>72</sup>

### B. The Territorial Incorporation Doctrine

The Supreme Court has repeatedly acknowledged Congress's plenary power over the territories.<sup>73</sup> In the *Insular Cases*, the Supreme Court broadly construed the Territorial Clause and refused to limit Congress's legislative power over the territories.<sup>74</sup> Through the *Insu-*

67. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

68. See *id.* at art. IX, 30 Stat. at 1759.

69. See José Julián Álvarez González, *The Empire Strikes Out: Congressional Rumination on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309, 318-30 (1990).

70. See *Afroyim v. Rusk*, 387 U.S. 253, 262-68 (1967) (holding that Fourteenth Amendment citizenship may not be altered by the federal government, the states, or any other governmental body).

71. See Jones Act of 1917, ch. 145, 39 Stat. 951, 953 (1917) (codified as amended in scattered sections of 48 U.S.C.).

72. Johnson, *supra* note 54, at 271.

73. See generally *De Lima v. Bidwell*, 182 U.S. 1, 197 (1901) (stating that a territory acquired by the United States belongs to the United States and is subject to disposition by Congress); *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) (stating that Congress could nullify the Utah Territory's polygamist law); *National Bank v. County of Yankton*, 101 U.S. 129, 132-33 (1879) (stating that Congress could nullify the law of the Territory of Dakota).

74. See *De Lima*, 182 U.S. at 197; *Goetze v. United States*, 182 U.S. 221, 221 (1901); *Crossman v. United States*, 182 U.S. 221, 221 (1901) (stating in both *Goetze* and *Crossman* that a board of tariff appraisers had no jurisdiction over goods imported from Puerto Rico or the Hawaiian Islands due to the fact that these were not foreign countries); *Dooley v. United States*, 182 U.S. 222, 235-36 (1901) (holding that Puerto Rico became part of the United States upon cession by treaty for purposes of tariffs); *Armstrong v. United States*, 182 U.S. 243, 243 (1901) (holding that tariff duties on goods imported from Puerto Rico were proper prior to cession by treaty); *Downes v. Bidwell*, 182 U.S. 244, 278-79 (1901) (concluding that because territories are not constitutional equivalents to states, they are subject to greater congressional control); *Huus v. New York & Porto [sic] Rico S.S. Co.*, 182 U.S. 392, 397 (1901) (holding that steamship trade between New York and Puerto Rico came under U.S. trade laws); *The Diamond Rings v. United States*, 183 U.S. 176, 181-82 (1901) (construing broadly the Territorial Clause of the Constitution and refusing to limit Congress's legislative power over the American territories); *Dorr v. United States*, 195 U.S. 138, 148 (1904) (holding that residents of unincorporated territories are guaranteed only rights that are fundamental); see also RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 53 (1984); González, *supra* note 69, at 318-30; Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Pur-*

lar Cases, the Supreme Court developed the "territorial incorporation doctrine."<sup>75</sup> Under this doctrine, all of the Constitution's provisions apply to territories that are incorporated into the United States, or assured eventual statehood, and only "fundamental" constitutional rights are applied to protect the residents of unincorporated territories.<sup>76</sup> The question then became which constitutional provisions were considered fundamental and applicable to the unincorporated territories.<sup>77</sup>

The Court in *Dorr v. United States*<sup>78</sup> held that "most, if not all, the privileges and immunities contained in the [B]ill of [R]ights of the Constitution were intended to apply from the moment of annexation . . ."<sup>79</sup> In addition, subsequent Supreme Court decisions recognized the application of the Fourth Amendment protection against unreasonable searches and seizures,<sup>80</sup> the Due Process Clause and the Equal Protection Clause of the Fifth and the Fourteenth Amendments,<sup>81</sup> the First Amendment's right to free speech,<sup>82</sup> and the constitutional right to travel.<sup>83</sup>

Despite these constitutionally guaranteed rights, several Supreme Court decisions highlighted a difference in the constitutional safeguards available to the people of Puerto Rico. The Court in *Balzac v.*

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*chased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 714 (1995) (stating that the Supreme Court decided in the *Insular Cases* that not all constitutional provisions need apply to unincorporated territories); Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 795 (1992); Rafael Perez-Bachs, *Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, 110 F.R.D. 485, 485-86 (1986) (stating that the influence of the *Insular Cases* on Territorial Clause jurisprudence did not end at the turn of the century).

75. See *Dorr*, 195 U.S. at 146; *Downes*, 182 U.S. at 289 (White, J., concurring); see also *Balzac v. Porto [sic] Rico*, 258 U.S. 298, 312-13 (1922).

76. These are territories for which Congress manifested no intent to grant statehood status. See Herald, *supra* note 74, at 714.

77. In *Downes*, the Court noted, "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence." *Downes*, 182 U.S. at 282.

78. 195 U.S. 138 (1904).

79. *Id.* at 144 (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 217-18 (1903)).

80. See *Torres v. Puerto Rico*, 442 U.S. 465, 474 (1979) (holding that the Fourth Amendment applies to Puerto Rico and that a Puerto Rico statute authorizing the police to search the luggage of a person arriving in Puerto Rico from the United States was unconstitutional).

81. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) (stating that constitutional due process applies to Puerto Rico); *Examining Bd. of Eng'rs, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 601 (1976) (stating that equal protection applies to Puerto Rico).

82. See *Balzac v. Porto [sic] Rico*, 258 U.S. 298, 314 (1922) (holding that a prosecution for libel was not a violation of the First Amendment and that a right to a jury trial is not a fundamental right as applied to unincorporated territories).

83. See *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (stating that there is a virtually unqualified constitutional right to travel between Puerto Rico and the 50 states of the Union).

*Porto* [sic] *Rico*,<sup>84</sup> held that the Sixth Amendment guarantee of a "speedy and public trial, by an impartial jury" in criminal prosecutions does not apply to the residents of Puerto Rico, unless such rights are made applicable by the local legislature.<sup>85</sup> In *Ocampo v. United States*,<sup>86</sup> the Court held that the Fifth Amendment right to presentment or indictment by a grand jury is inapplicable to the inhabitants of unincorporated territories.<sup>87</sup> In *Dowdell v. United States*,<sup>88</sup> the Court denied a criminal defendant in an unincorporated territory the Sixth Amendment right to confront witnesses.<sup>89</sup> In *Dorr*, the Court held that the Sixth Amendment right to a jury trial was not a fundamental right as applied to the unincorporated territories.<sup>90</sup> Finally, in *Balzac*, the Court reasoned that these rights were not fundamental rights, but procedural rights established by those societies of more sophisticated Anglo-Saxon origin.<sup>91</sup>

Since *Balzac*, the Supreme Court has reaffirmed the limited rights held by the people of Puerto Rico.<sup>92</sup> In 1957 the Court in *Reid v. Covert*<sup>93</sup> endorsed the incorporation doctrine, noting that certain constitutional safeguards were not applicable to the territories.<sup>94</sup> In describing the territories under the jurisdiction of Congress, the Court specifically observed that these territories "had entirely different cultures and customs from those of this country."<sup>95</sup>

In 1971 the Court in *Rogers v. Bellei*<sup>96</sup> recognized that Congress had the power to revoke the citizenship of those granted citizenship

84. 258 U.S. 298 (1922).

85. *See id.* at 304.

86. 234 U.S. 91 (1914).

87. *See id.* at 98; *see also Porto* [sic] *Rico v. Muratti*, 245 U.S. 639, 639 (1918) (holding that the right to a grand jury indictment is inapplicable to the residents of Puerto Rico).

88. 221 U.S. 325 (1911).

89. *See id.* at 331-32 (Philippine Islands).

90. *See Dorr v. United States*, 195 U.S. 138, 144-46 (1904). Not all of the Justices during this period endorsed the Court's legal fiction of fundamental rights. In *Dorr*, Justice Harlan courageously criticized the majority's holding that the right to trial by jury was not fundamental. He wrote:

[G]uaranties for the protection of life, liberty, and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.

*Id.* at 154 (Harlan, J., dissenting).

91. *See Balzac v. Porto* [sic] *Rico*, 258 U.S. 298, 310 (1922) ("In common-law countries centuries of tradition have prepared a conception of the imperial attitude jurors must assume.").

92. *See, e.g., United States v. Verdugo-Urguidez*, 494 U.S. 259, 267-68 (1990); *Harris v. Rosario*, 446 U.S. 651, 653-54 (1980); *Reid v. Covert*, 354 U.S. 1, 13 (1957).

93. 354 U.S. 1 (1957).

94. *See id.* at 13 (stating that the Supreme Court had previously refused to apply certain constitutional safeguards to the territories).

95. *Id.*

96. 401 U.S. 815 (1971).

by statute.<sup>97</sup> The Court held that Congress could impose a condition subsequent on citizenship for those not falling within the Fourteenth Amendment's definition of citizen—born or naturalized in the United States.<sup>98</sup> In 1980 the Court in *Harris v. Rosario*<sup>99</sup> held that the Territorial Clause governs the relationship between the United States and Puerto Rico.<sup>100</sup> The Court reasoned that Congress, pursuant to its Territorial Clause powers, can constitutionally provide less federal assistance to the Puerto Rican statutory citizens as compared to the United States constitutional citizens.<sup>101</sup> In 1990 the Court in *United States v. Verdugo-Urquidez*<sup>102</sup> reaffirmed the holding that only fundamental constitutional rights apply to unincorporated territories.<sup>103</sup> After reviewing these and other cases, the Congressional Research Service (CRS) concluded that, absent recognition of full and equal Fourteenth Amendment citizenship, the statutory citizenship of the people of Puerto Rico could be modified or even revoked by Congress.<sup>104</sup>

The Puerto Rican people's disenfranchised status has not only caused inequality of political and civil rights, but has also manifested itself through unequal economic treatment.<sup>105</sup> As a result of their subordinated status, residents of Puerto Rico receive less favorable treatment than mainland citizens under a number of major federal benefits programs. For the residents of Puerto Rico, federal payments under Aid to Families with Dependent Children (AFDC), Medicaid, and food stamps are made at lower levels and are subject to an overall cap.<sup>106</sup> Similarly, the Supplemental Security Income program (SSI) does not apply to Puerto Rico.<sup>107</sup> Benefits under a similar program are capped and are made at lower levels than SSI

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97. See *id.* at 836 (holding valid a federal statute that removes citizenship upon failure to comply with a residential requirement).

98. See *id.* at 831.

99. 446 U.S. 651 (1980).

100. See *id.* at 651-52.

101. See *id.*

102. 494 U.S. 259 (1990).

103. See *id.* at 268-69.

104. See Congressional Research Service Memorandum: *Discretion of Congress Respecting Citizenship Status of Puerto Rico* (Mar. 9, 1989), in 2 PUERTO RICO: POLITICAL STATUS REFERENCE, 1989-1991, at 81-85 (Puerto Rico Fed. Affairs Admin. ed., 1992).

105. Puerto Rican citizens, with the exception of federal employees, are exempt from federal income taxes on income earned in Puerto Rico. See 26 U.S.C. § 933 (1994).

106. See S. REP. NO. 101-481, at 10-11 (1990) ("Under present law, federal social welfare programs under the Social Security Act such as AFDC, Medicaid, Aid to the Aged, Blind and Disabled, Foster Care and Adoption Assistance, and Social Services block grant operate differently in Puerto Rico than they do in the states. Under statehood, both the amount of the welfare benefits and the percentage of population receiving them would increase."); see also T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENTARY 15, 15 (1994).

107. See *Califano v. Torres*, 435 U.S. 1, 2 (1978) (holding that government benefits of a state citizen do not transfer when that citizen moves to Puerto Rico).



payments made to eligible persons residing in the states.<sup>108</sup> Benefits for needy children are likewise provided at appreciably lower levels.<sup>109</sup>

Relying on the territorial incorporation doctrine, the United States Supreme Court has held that this unequal economic treatment is constitutional. The Justices concluded that as long as there is a rational basis for the discrimination, the Court will uphold the acts. For instance, in *Califano v. Torres*,<sup>110</sup> the Court held Congress can discriminate against the elderly, the blind, and the disabled if they are inhabitants of Puerto Rico, even though they would otherwise be eligible under the SSI program of the Social Security Act.<sup>111</sup> Similarly, in *Harris* the Court upheld as constitutional the reimbursement of lower levels of AFDC to the people of Puerto Rico.<sup>112</sup> Resting on Congress's power under the Territorial Clause, the Court in these decisions summarily found a rational basis for disparate treatment, thereby justifying Congress's discriminatory action.<sup>113</sup>

Thus, the United States citizenship of the Puerto Rican people was and remains different from that held by their mainland counterparts.<sup>114</sup> Simply stated, this can have important consequences because a citizen with subordinated rights is not a citizen. As Kenneth L. Karst observed, the principle of equal citizenship is at the core of the Fourteenth Amendment and cannot include "treat[ing] people as members of an inferior or dependent caste, or as non-participants."<sup>115</sup> Similarly, Lawrence Tribe's anti-subjugation principle demands equality in an effort "to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens."<sup>116</sup>

108. See Social Security Amendments of 1972, Pub. L. No. 92-603, § 303(b), 86 Stat. 1329, 1484 (repealing Titles I, X, and XIV of the Social Security Act with the exception that these titles would still apply to Puerto Rico, Guam, and the Virgin Islands); 42 U.S.C. § 1308(a)(1) (Supp. 1997) (specifying the amount of social security payments to Puerto Rico, Guam, the Virgin Islands, and American Samoa); see also 42 U.S.C. § 1396(b) (1994).

109. See 42 U.S.C. § 1396(b) (1994).

110. 435 U.S. 1 (1978).

111. See *id.* at 4-5.

112. See *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980).

113. See *id.*; see also *Califano*, 435 U.S. at 4-5.

114. See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U. P.R. 225, 235 (1996) (reviewing the role of the U.S. Supreme Court in justifying U.S. imperialism). Ironically, the United States, as the colonial sovereign, exercises jurisdiction over the most basic aspects of life in the territory as it does in the states, including communications, currency, labor relations, postal service, environment, foreign affairs, and military defense.

115. Karst, *supra* note 24, at 1.

116. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1515 (2d ed. 1988). Tribe explained:

When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws. The "citizenship clause of the

### III. THE COLONIAL HISTORY OF PUERTO RICO

By the time the United States annexed Puerto Rico in 1898, the United States had acquired considerable expertise in discriminating against the Native Americans, the Chinese, the Japanese, and the Africans.<sup>117</sup> The colonial history of Puerto Rico is laden with intense congressional debate and a Supreme Court jurisprudence concerning the acceptance of the inhabitants of Puerto Rico, which has served to limit the extent of Puerto Rican U.S. citizenship.

In 1898 Spain ceded Puerto Rico to the United States as a result of the U.S. victory over Spain in the Spanish-American War.<sup>118</sup> Specifically, the Treaty provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."<sup>119</sup>

In 1898, immediately after the acquisition of Puerto Rico, the United States established a military government overseen by General Nelson A. Miles, the commanding general of the U.S. Army.<sup>120</sup> Even during the establishment of a military government, the Puerto Rican people were led to believe that the United States would accept them. General Miles promised to protect the Puerto Rican people, to promote prosperity, and to bestow "the immunities and blessings of the liberal institutions of the [United States] Government."<sup>121</sup> Under the Foraker Act, two years later, the United States replaced the military government with a civilian colonial government.<sup>122</sup>

The Foraker Act did not bring the people of Puerto Rico closer to full incorporation into the United States because the Act declared the inhabitants of Puerto Rico to be "citizens of Puerto Rico."<sup>123</sup> In 1900 Congress changed the name of "Puerto Rico," which is translated to mean "Rich Port," to "Porto" Rico, which is not even a word in Span-

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fourteenth amendment . . . does not allow for degrees of citizenship": No citizen is "more equal" than any other.

*Id.*

117. See RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946*, at 35-36, 194-207 (1972).

118. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. IX, 30 Stat. 1754, 1759; see also JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 3 n.1 (1985).

119. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754. The Territory Clause provided Congress with the power to govern the native inhabitants of the ceded territories. See U.S. CONST. art. IV, § 3, cl. 2.

120. See DOCUMENTS, *supra* note 32, at 54.

121. *Id.* at 55.

122. See Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in various sections of 48 U.S.C.) (providing for the enactment of a civil government, including a limited elected legislature and an appointed supreme court and governor).

123. *Id.* at 79.

ish.<sup>124</sup> It took over thirty years for the United States to correct the name of the territory.<sup>125</sup>

The other potential U.S. acquisitions from the Spanish-American War included Cuba,<sup>126</sup> Guam, and the Philippines.<sup>127</sup> Prior to 1898, the United States traditionally had granted statehood to territorial acquisitions.<sup>128</sup> However, the acquisition of these new territories stirred an intense controversy over the future of the new possessions.<sup>129</sup> The leading foreign policy debate in Congress centered on what should be done with the inhabitants of the newly acquired territories.<sup>130</sup> The basis for the concern was that these territories were different and inhabited by "racially and culturally distinct peoples."<sup>131</sup> The debate focused on the two largest territories—Puerto Rico<sup>132</sup> and the Philippines.<sup>133</sup> Thus, from the very beginning of the United States' relationship with Puerto Rico, race and racial constructions were significant issues.

Congress debated the status of the Filipinos and Puerto Ricans simultaneously. One report portrayed the Filipinos as "physical weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet."<sup>134</sup> Representative Sereno Payne trumpeted census reports taken of the people of Puerto Rico showing that "whites . . . generally full-blooded white people, descendants of the Spaniards" outnumbered by nearly two-to-one the com-

124. See CABRANES, *supra* note 51, at 1.

125. See Act of May 17, 1932, ch. 190, 47 Stat. 158 (1932).

126. The United States did not formally annex Cuba because the United States purportedly intervened in Cuba to help secure Cuba's independence. See 2 PHILIP S. FONER, A HISTORY OF CUBA AND ITS RELATIONS WITH THE UNITED STATES 337-40 (1963). By Congressional resolution, Congress declared its intentions not to annex Cuba. In the Teller Resolution, Congress provided "[t]hat the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over . . . [Cuba]." H.R.J. Res. 24, 55th Cong. (1898).

127. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (acquiring three former Spanish territories—Puerto Rico, Guam, and the Philippines).

128. See Ramos, *supra* note 114, at 236-37 (stating that the Northwest Ordinance of 1787 provided a multi-stage model leading toward eventual statehood).

129. See *id.* at 227.

130. See CABRANES, *supra* note 51, at 4.

131. *Id.*

132. In 1900 the Foraker Act did not provide the people of Puerto Rico with U.S. citizenship, but it provided them with the status of U.S. nationals. While a citizen is "a person who is endowed with full political and civil rights in the body politic of the state," a national is "a person who, though not a citizen, owes permanent allegiance to the state and is entitled to its protection." *Id.* at 6 n.12 (quoting 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-2 (1942)). According to the Foraker Act, "[A]ll inhabitants continuing to reside [in Puerto Rico] . . . shall be deemed and held to be citizens of Porto [sic] Rico, and as such entitled to the protection of the United States." Foraker Act, ch. 191, § 7, 31 Stat. 77, 79 (1900).

133. See CABRANES, *supra* note 51, at 4-5.

134. 33 CONG. REC. 3613 (1900) (quoting from a report of the Philippine Commission to the President).

bined total of "negroes" and "mulattoes."<sup>135</sup> Meanwhile, Congresspersons viewed the Filipinos as "non-white" and, therefore, uncivilized and un-American. Comparing the Filipinos to the people of Puerto Rico, Representative Thomas Spight noted "[h]ow different the case of the Philippine Islands, 10,000 miles away. . . . The inhabitants are of wholly different races of people from ours—Asiatics, Malays, negroes and mixed blood. They have nothing in common with us and centuries cannot assimilate them."<sup>136</sup> Representative John Dalzell stated that he was unwilling "to see the wage-earner of the United States, the farmer of the United States, put upon a level and brought into competition with the cheap half-slave labor, savage labor, of the Philippine Archipelago."<sup>137</sup> Other representatives shared this sentiment; Dalzell's comments were greeted by loud applause in the House.<sup>138</sup> Similarly, Representative George Gilbert warned against "open[ing] wide the door by which these negroes and Asiatics can pour like the locusts of Egypt into this country."<sup>139</sup> Senator William Bate likewise stated:

Let us not take the Philippines in our embrace to keep them simply because we are able to do so. I fear it would prove a serpent in our bosom. Let us beware of those mongrels of the East, with breath of pestilence and touch of leprosy. Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.<sup>140</sup>

The fear of foreign influx was not limited to congressional debate. Scholars also contributed to the xenophobia.<sup>141</sup> In a series of articles

135. *Id.* at 1941 (remarks of Rep. Payne).

136. *Id.* at 2105 (remarks of Rep. Spight).

137. *Id.* at 1959 (remarks of Rep. Dalzell).

138. *See id.*

139. *Id.* at 2172 (remarks of Rep. Gilbert).

140. *Id.* at 3616 (remarks of Sen. Bate). Though Senator Bate's comments contained racist overtones, they also expressed a distaste for the imperial nature of the United States' ambitions. Earlier in the debate, Senator Bate declared:

I was opposed to acquiring the islands of Spain, and for that reason, in part, voted against the ratification of the treaty of Paris. I am opposed to the retention of those . . . islands a moment longer than is necessary to reestablish order and security. I do not approve the manner in which the islands and their people were obtained and have been treated since they came under our control. But so long as the islands are under our control, and so long as our flag floats there, the representative of our authority, and peace having been secured, I shall, as far as may be within my power, advocate and support the extension to those people of every privilege, right and immunity which the people of the States enjoy.

*Id.* at 3612.

141. See Gabriel Terrasa, *The United States, Puerto Rico and the Territorial Incorporation Doctrine*, 31 J. MARSHALL L. REV. 55, 56 (1997) (noting that racism by politicians and scholars led to a plan to maintain the new territories as "dependencies," which were not due the same constitutional protections as the states).

published in the *Harvard Law Review*, this fear of foreigners prevailed. One writer noted:

Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities . . . would . . . be a serious obstacle to the maintenance there of an efficient government.<sup>142</sup>

Another writer argued that "[w]hat was appropriate in the case of some territories might not be in other cases. A cannibal island and the Northwest territory would require different treatment . . ."<sup>143</sup>

Eventually these concerns and other more legitimate ones<sup>144</sup> led Congress to decide ultimately to treat the two territories differently. The Jones Act of 1916<sup>145</sup> promised independence to the Philippines, and the Jones Act of 1917 granted U.S. citizenship to the people of Puerto Rico.<sup>146</sup>

#### A. *The Impact of the Insular Cases*

Notwithstanding the 1917 grant of statutory U.S. citizenship, the U.S. Supreme Court made it clear that the United States would not incorporate the Puerto Rican people and would not extend the panoply of rights traditionally available to constitutionally-based, U.S. citizens. One year after establishing a civilian colonial government under the Foraker Act of 1900, the Supreme Court, in the *Insular*

142. Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899).

143. James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 481 (1899).

144. See CABRANES, *supra* note 51, at 30-32 (noting that more legitimate concerns included proximity, economic considerations, and the Puerto Ricans' lack of resistance to invasion and occupation).

145. Ch. 416, 39 Stat. 545 (1916) (repealed upon the independence of the Philippines in 1946).

146. See Jones Act of 1917, ch. 145, § 5, 39 Stat. 951, 953 (1917) (conferring U.S. citizenship on all "citizens of Porto [sic] Rico" as that term was defined in the Foraker Act). However, even the initial grant of U.S. citizenship did not come without confusion. The Jones Act of 1917 did not make any provision for persons born in Puerto Rico after the passage of the Act. See González, *supra* note 69, at 325. The Immigration and Nationality Act of 1952 generally resolved this confusion:

All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

8 U.S.C. § 1402 (1994).

Cases, provided an explicit justification for the American colonial project in Puerto Rico, and reinforced American nativism.<sup>147</sup> These decisions sanctioned this country's colonial expansion and legitimized the second-class citizenship status of the people of Puerto Rico.<sup>148</sup>

The *Insular Cases* expanded upon the reasoning in *Dred Scott*, which "opened up new ground for compromise between full equality of constitutional rights and relegation to extralegal status . . . ."<sup>149</sup> The *Insular Cases* confirmed that the inhabitants of U.S. territories had some, but not all, of the rights held by other U.S. citizens under the Constitution and, as such, were not true members of the U.S. body politic.<sup>150</sup>

One year after the Foraker Act, the U.S. Supreme Court relied on the Territorial Clause in holding that "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be in . . . the 'American Empire.'"<sup>151</sup> Thus, for purposes of statehood and Fourteenth Amendment U.S. citizenship, the Supreme Court ruled that Puerto Rico is only part of the United States in limited respects.<sup>152</sup>

During the U.S. expansionist era of the nineteenth century, the United States experienced ethnic nationalism, which also engulfed Europe during the same period.<sup>153</sup> The *Insular Cases* endorsed the U.S. policy of acquiring territories and their peoples "without conferring the rights of citizenship on subjects who were racially unfit for it."<sup>154</sup> The Court rejected earlier precedents that defined the United States as including both states and territories equally subject to the

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147. See Ramos, *supra* note 114, at 240.

148. Race was a determinative factor throughout the United States' era of expansion. For instance, President Grant's efforts to acquire the Dominican Republic in the 1870s failed due, in large measure, to fears concerning the race and "civilization" of the Dominican people. See ERNEST R. MAY, *AMERICAN IMPERIALISM: A SPECULATIVE ESSAY* 100-01 (1968).

149. Neuman, *supra* note 43, at 957-58 (suggesting that the Supreme Court used the reasoning in *Dred Scott* as a starting point to limit the rights of citizens in the unincorporated territories).

150. See *supra* notes 42, 74-90 and accompanying text.

151. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (involving a New York businessman who did not want to pay duties on oranges shipped from Puerto Rico).

152. See *id.*

153. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* 145 (1996) (concluding that "ethnic nationalism" manifested itself in this country when Americans viewed citizens of the newly-acquired territories as unfit for American citizenship).

154. *Id.*

provisions of the Constitution<sup>155</sup> and treated these native indigenous people differently than the citizens of the states.<sup>156</sup>

In *De Lima v. Bidwell*,<sup>157</sup> the Court upheld Congress's unfettered power over Puerto Rico and its people:

"Congress has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments . . . ." [Congress] may organize a local territorial government; it may admit it as a state . . . it may sell its public lands to individual citizens or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress.<sup>158</sup>

In *Downes v. Bidwell*,<sup>159</sup> Justice Brown, writing for the Court, recognized that the United States could use its unlimited territorial power to determine the status of an acquired territory's inhabitants and could consequently stop the theoretical influx of foreigners into the United States. Justice Brown warned, "[I]f their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their *status*, the consequences will be extremely serious."<sup>160</sup>

Justice Brown further elaborated upon the prevalent Anglo-Saxon nativistic thought:

If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.<sup>161</sup>

The *Downes* court recognized that the territories were different than the states. Therefore, the Constitution did not apply to the ter-

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155. See *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 318-22 (1820) "That the general grant of power to lay and collect taxes, is made in terms which comprehend the district and territories as well as the States, is, we think, incontrovertible." *Id.* at 322.

156. See *Herrera*, *supra* note 8, at 613.

157. 182 U.S. 1 (1900).

158. *Id.* at 196-97 (quoting in part *National Bank v. County of Yankton*, 101 U.S. 129 (1879)) (discussing whether a territory ceded to the United States remained a "foreign country" within the meaning of the tariff laws).

159. 182 U.S. 244 (1901).

160. *Id.* at 279.

161. *Id.* at 287.

ritories the same way it did to inhabitants of the states.<sup>162</sup> The Court concluded that Puerto Rico was "a territory appurtenant and belonging to the United States, but not a part of the United States within the . . . Constitution."<sup>163</sup>

In his concurring opinion, Justice White contributed significantly to this imperialistic constitutional doctrine.<sup>164</sup> Quoting from an earlier opinion, Justice White reaffirmed, "The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or treaty."<sup>165</sup> Justice White further noted that "if it be ceded by . . . treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty . . . or on such as its new master shall impose."<sup>166</sup>

Justice White opined that the scope of constitutional protection given to the inhabitants of the newly acquired territories depended on "the situation of the territory and its realities to the United States."<sup>167</sup> Under this approach, Congress did not have to extend the Constitution, but it could extend the United States.<sup>168</sup> Full constitutional protection was reserved for territories that Congress had incorporated into the United States, as opposed to those merely acquired.<sup>169</sup> Justice White's concurring opinion and subsequent Supreme Court decisions recognized the constitutional principle that a conquering country could take several approaches with a new territory.<sup>170</sup> The conqueror could admit the territory as a state, incorporate it into the U.S. as an integral territory, leave it as a territory appurtenant, leave it foreign by foregoing acquisition, or pursue other seemingly appropriate alternatives.<sup>171</sup> Justice White justified this discretion by maintaining that the "evil of immediate incorporation"<sup>172</sup> would open up the borders to "millions of inhabitants of alien territory" who could overthrow "the whole structure of the government."<sup>173</sup>

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162. *See id.*

163. *Id.* The Court, nonetheless, acknowledged that Congress's power was subject to the Constitution's "fundamental limitations in favor of personal rights . . ." *Id.* at 268.

164. *See id.* at 302-03 (White, J., concurring).

165. *Id.* at 303 (quoting *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828)).

166. *Id.* at 302 (quoting *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828)).

167. *Id.* at 293.

168. *See* Neuman, *supra* note 43, at 961.

169. *See* Herrera, *supra* note 8, at 612 ("According to Justice White . . . incorporation could not occur merely by the exercise of the treaty-making power; it required congressional legislation."); *see also* Downes, 182 U.S. at 339 (White, J., concurring).

170. *See* Neuman, *supra* note 43, at 961.

171. *See id.*

172. *Downes*, 182 U.S. at 311 (White, J., concurring).

173. *Id.* at 313.



Under Justice White's approach, only through incorporation could alien people attain the rights that peculiarly belong to the citizens of the United States.<sup>174</sup> Thus, incorporation became a political decision.<sup>175</sup> This principle allowed the United States to expand its empire without being constitutionally compelled to accept as citizens populations that might be part of an "uncivilized race."<sup>176</sup> Otherwise, incorporation could trigger "the immediate bestowal of citizenship on those absolutely unfit to receive it."<sup>177</sup>

The question the *Insular Cases* failed to address is how these decisions comport with this country's democratic principles and its representative form of governance. As Professor Gerald L. Neuman observed in his book *Strangers to the Constitution*:

For the federal government to acquire total governing power over new territories—more complete, in fact, than in the states—without the consent of the local population and without according them . . . the rights reserved under the Constitution raises starkly the question of how the exercise of such governing power can be legitimated.<sup>178</sup>

Despite this logical shortcoming, the U.S. Supreme Court followed the morally illegitimate constitutional principle announced in *Downes*. In *Dorr v. United States*,<sup>179</sup> a majority of the Court adopted the territorial incorporation doctrine. The *Dorr* Court recognized that the Constitution did not fully apply to an acquired territory if Congress had not incorporated the territory.<sup>180</sup> As Puerto Rico had never been "incorporated" by Congress, the limited form of U.S. citizenship that the Puerto Rican people eventually received was consistent with this constitutional doctrine.

Two decades later in *Balzac v. Porto [sic] Rico*,<sup>181</sup> the Court reaffirmed the unequal citizenship status of the Puerto Rican people. The *Balzac* Court held that the citizenship status given to the Puerto Rican people under the 1917 Jones Act did not alter the constitutional status of its inhabitants.<sup>182</sup> As a result, the residents of Puerto Rico had no right to demand a trial by jury under the Sixth Amendment of the United States Constitution.<sup>183</sup> Once again, the Court justified its

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174. See Ramos, *supra* note 114, at 248.

175. See *id.* at 245-50.

176. *Downes*, 182 U.S. at 306. In an eloquent dissent in *Downes*, Justice Harlan courageously objected to the logic and morality of the incorporation doctrine: "The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of states or territories . . ." *Id.* at 378 (Harlan, J., dissenting).

177. *Id.* at 306.

178. NEUMAN, *supra* note 153, at 100.

179. 195 U.S. 138 (1903).

180. See *id.* at 142-43.

181. 258 U.S. 298 (1921).

182. See *id.* at 309.

183. See *id.*

denial of this right by declaring that "[t]he jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire."<sup>184</sup>

### B. Congressional Debate After the Insular Cases

Shortly after the Supreme Court confirmed the differential status of the inhabitants of the newly acquired territories and Congress's plenary power to decide the fate of those inhabitants, the United States attempted to "civilize" the Puerto Rican people in a purported effort to eventually fully incorporate them into American society.<sup>185</sup> However, when the issue of full incorporation arose, congressional representatives expressed concern over "darkening" the American frontier.<sup>186</sup> Faced with the difficulties of Americanizing the Puerto Rican people through efforts such as requiring English to be taught in public schools, Representative James Slayden, in 1909, explained why he believed Puerto Rico was saddled with troubles: "[W]e are of different races. . . . We are mainly Anglo-Saxon, while they are a composite structure, with liberal contributions to their blood from Europe, Asia, and Africa. They are largely mongrels now . . . ."<sup>187</sup>

Notwithstanding these concerns, in 1917 Congress enacted the Jones Act, which granted the people of Puerto Rico U.S. citizenship.<sup>188</sup> The "boon" of U.S. citizenship,<sup>189</sup> however, did not come about without race-based criticism.<sup>190</sup> Senator Kimble Vardaman com-

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184. *Id.* at 310. The *Balzac* Court, somewhat surprisingly, made completely inconsistent statements concerning the citizenship status of the people of Puerto Rico. Despite holding that such citizens did not have a constitutional right under the Sixth Amendment, the Court announced that the grant of United States citizenship to the people of Puerto Rico was "to put them as individuals on an exact equality with citizens from the American homeland . . . ." *Id.* at 311.

185. See RONALD FERNANDEZ, *THE DISENCHANTED ISLAND* 55-56 (2d. ed. 1996).

186. See *id.* at 57. Representative Atterson Rucker of Colorado stated, "The production of [Puerto Rican] children, especially of the dark color, is largely on the increase." *Id.* (quoting 43 CONG. REC. 2923 (1909)).

187. 43 CONG. REC. 2921 (1909) (remarks of Rep. Slayden).

188. See Ch. 145, 39 Stat. 951, 953 (1917) (codified as amended in scattered sections of 48 U.S.C.).

189. In *Balzac v. Porto* [sic] *Rico*, 258 U.S. 298, 308 (1922), Chief Justice Taft noted, "When Porto [sic] Ricans passed from under the government of Spain, they lost the protection of that government . . . . They had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign." *Id.* Responding to the yearning of the islanders, the United States gave them the "boon" of U.S. citizenship. See *id.*

190. The granting of U.S. citizenship to the Puerto Rican people occurred during the hey-day of American nativism, during what is known as the Americanization movement where, among other things, several states adopted laws restricting the use of foreign language and sought to secure segregated schools in an effort to preserve "America for Americans." Knapp, *supra* note 47, at 415; see also Donna F. Coltharp, Comment, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARY'S L.J. 149, 160-61 (1996).

plained, "I really had rather [Puerto Ricans] would not become citizens of the United States. I think we have enough of that element in the body politic already to menace the Nation with mongrelization . . ."<sup>191</sup> The Puerto Rican people were nevertheless similar enough to the "Anglo-Saxon" Americans to be allowed a form of U.S. citizenship. While this acknowledgment suggested eventual full incorporation into the United States, eighty years later incorporation still has not occurred.<sup>192</sup>

### C. *The Creation of the Commonwealth*

Approximately forty years after the conquest, the people of Puerto Rico grew tired of their less-than-equal status, and the Puerto Rican legislature demanded that Congress terminate "the colonial system of government totally and definitely."<sup>193</sup> After this demand, President Roosevelt initiated the first of what was to become the trademark U.S. response to the Puerto Rican plea for incorporation or autonomy—congressional or executive department hearings to review the status issue. Ultimately, Roosevelt's committee did not change much. Instead, the United States created a euphemism for the term "colony" with the creation of commonwealth status.<sup>194</sup>

It is not surprising that the status of the people of Puerto Rico did not change because many perceptions concerning the Puerto Rican people during this period mirrored the racist and nativistic sentiment of the early 1900s. A contemporary writer has suggested that during the 1940s "there were 'general notions' in the U.S. that all Puerto Ricans were 'oversexed' and indulged in 'excessive promiscuity.' . . . Americans believed 'that the men carry knives and use them unrestrainedly, that all Puerto Ricans are ignorant, unintelligent and stupid because they do not speak English . . .'"<sup>195</sup>

191. 54 CONG. REC. 2250 (1917) (remarks of Sen. Vardaman).

192. See CABRANES, *supra* note 51, at 33 (noting that states eventually would be formed from newly acquired territories).

193. *Autonomy Is Asked for in Puerto Rico Vote*, N.Y. TIMES, Feb. 11, 1943, at 6.

194. See Act of July 3, 1952, ch. 567, 66 Stat. 327 (1952) (approving the constitution of the commonwealth); Act of July 3, 1950, ch. 446, 64 Stat. 319 (1950) (providing for organization of the constitutional government). For a more elaborate discussion of the creation of the commonwealth, see TORRUELLA, *supra* note 118, at 133; Román, *supra* note 62, at 1119.

195. Richie Pérez, *From Assimilation to Annihilation: Puerto Rican Images in U.S. Films*, 2 CENTRO BULL., Spring 1990, at 8, 12 (quoting a 1949 study entitled "Cultural Conflicts in the Puerto Rican Adjustment"). A 1947 article on "cryptomelanism" noted considerable drawbacks to being a dark-skinned Puerto Rican, including the fact that such a color is "not presentable to North Americans." FRANCISCO CARDASCO, *THE PUERTO RICAN EXPERIENCE* 57 (1973).

Consequently, the United States, with the assistance of influential Puerto Rican leaders such as Luis Muñoz Marín,<sup>196</sup> established a compromise—the new commonwealth status, instead of granting Puerto Rican independence or incorporating it as a state.<sup>197</sup> Commonwealth status provided the Puerto Rican people with more local control, but did not allow for complete autonomy or complete integration under statehood. The Puerto Rican people thus remained less-than-equal U.S. citizens, and colonialism remained intact. The legislative history of Public Law 600,<sup>198</sup> which provided for the organization of a constitutional government via commonwealth status, clarified that the United States was not prepared to promise the Puerto Rican people anything other than colonialism. A House Report on the law noted:

The bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States.

... This bill does not commit the Congress, either expressly or by implication, to the enactment of statehood legislation for Puerto Rico in the future.

....

The United States has never made any promise to the people of Puerto Rico, or to Spain from whom Puerto Rico was acquired, that Puerto Rico would eventually be admitted into the Union.<sup>199</sup>

In granting this modicum of local autonomy under Public Law 600, Congress paternalistically declared that the Puerto Rican people should be allowed some say about their social and political future because "the people of Puerto Rico have demonstrated by their intelligent administration of local government activities . . . and by their high degree of political consciousness, that they are eminently qualified to assume greater responsibilities of local self-government."<sup>200</sup>

Despite the creation of the new constitution, the Puerto Rican people continued to call for an end to colonialism. Congress in turn enacted Public Law Number 88-271,<sup>201</sup> creating a commission to study the status of Puerto Rico.<sup>202</sup> In 1966 the Puerto Rican Legislature enacted a bill requesting a binding plebiscite to resolve the status question.<sup>203</sup> However, after Congress failed to take further ac-

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196. Luis Muñoz Marín was the governor of Puerto Rico from 1948 to 1964. See JOSE TRIAS MONGE, *PUERTO RICO* 106 (1997).

197. For a further discussion of the hegemony that prevailed in Puerto Rico during this period, see Román, *supra* note 62, at 1119.

198. See Act of July 3, 1950, ch. 446, 64 Stat. 319 (1950).

199. H.R. REP. NO. 81-2275, at 3 (1950), reprinted in 1950 U.S.C.C.A.N. 2682, 2683.

200. *Id.* at 4, reprinted in 1950 U.S.C.C.A.N. 2682, 2684.

201. See Act of Feb. 20, 1964, Pub. L. No. 88-271, 78 Stat. 17 (1964).

202. See *id.*

203. See Román, *supra* note 62, at 1161.

tion, the Puerto Rican people held a non-binding plebiscite.<sup>204</sup> Since Congress never agreed to be bound by it, Congress largely ignored the results of the plebiscite.<sup>205</sup>

Subsequent efforts in the United States to address the status of the Puerto Rican people simply mirrored earlier presidential committee efforts. In 1973 President Nixon established an advisory group.<sup>206</sup> President Ford, just days before the end of his term, proposed a statehood bill that called for congressional hearings.<sup>207</sup> President Carter, likewise, appointed a committee to examine the issue.<sup>208</sup> President Bush, in his first State of the Union address, similarly urged Congress "to take the necessary steps to allow the people to decide in a referendum."<sup>209</sup>

#### D. The 1993 Plebiscite

Apparently tired of its colonial status, the Puerto Rican Legislature formally advised Congress in 1989 that "the people of Puerto Rico wish to be consulted as to their preference with regards to their ultimate political status."<sup>210</sup> Consistent with its prior behavior, Congress did not act. In 1993 the Puerto Rican people responded by holding yet another plebiscite.<sup>211</sup> However, before allowing the people of Puerto Rico the right to assert their wishes in this latest plebiscite, Congress questioned whether it would even allow the people of Puerto Rico to choose their future.<sup>212</sup> In doing so, congressional leaders expressed a similar type of racism and ethnic-based discrimination that dominated the debate over Puerto Rico's status ninety years earlier.<sup>213</sup> With the 1990s came the decreasing interest in possessing the Panama Canal and the decline of the Soviet bloc's influence in the region.<sup>214</sup> Puerto Rico, accordingly, became less important, and its people were even more unwelcome.

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204. See FERNANDEZ, *supra* note 185, at 221. Sixty percent of the population voted for "continuation of the present status," and thirty-nine percent voted for statehood. *Id.*

205. See CARR, *supra* note 74, at 93.

206. See General Accounting Office, *Puerto Rico: Information for Status Deliberations* (June 15, 1989), in 3 PUERTO RICO: POLITICAL STATUS REFERENDUM 1989-1991, at 18 (P.R. Fed. Affairs Admin. ed., 1992).

207. See *id.*

208. See *id.* at 17.

209. 144 CONG. REC. H772-04, H773 (daily ed. Mar. 6, 1998) (statement of Rep. Young).

210. *Id.* The Puerto Rican legislature repeated its requests for Congressional action in 1993, 1994, and again in 1997. See *id.*

211. See FERNANDEZ, *supra* note 185, at 261. According to Fernandez, 48.4% voted for Commonwealth status, 46.2% for statehood, and 4.4% for independence. See *id.*

212. See *id.*

213. See *supra* notes 135-40 and accompanying text.

214. See A. Martin Wagner & Neil A.F. Popouic, *Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free from Contamination and Explosives*, 38 VA. J. INT'L L. 401, 403 (1998); Board of Editors, *New Challenges*

The focus in Congress turned to the possible results of a plebiscite. In deciding whether the Puerto Rican people could decide their own political destiny, congressional leaders repeatedly expressed grave concerns that these people might choose to be free or, worse yet, choose to become the inhabitants of the fifty-first state of the Union.<sup>215</sup> During congressional committee debates concerning the plebiscite, several representatives "expressed deep misgivings" about allowing a referendum.<sup>216</sup> Senator Daniel Patrick Moynihan of New York admonished his colleagues for their naked display of bigotry.<sup>217</sup> In chastising his colleagues, Senator Moynihan explained that the people of Puerto Rico are U.S. citizens:

[I]n the Committee on Energy and Natural Resources, it became very clear that many on that committee are prepared to deny them. It is nativism, the close associate of racism, that lived in this body for a century and a half, in this Chamber and the one to the left down the hall, the nativism that all of us have acquired.

....  
... Now, Puerto Ricans did not ask to be in this situation. As a matter of fact, Puerto Ricans up until now have not been asked much of anything. They were a prize of an imperialist war. . . . Senators may be leery, but what is this talk of they do not fit culturally? They sure as hell fit culturally in the 82d Airborne Division, sir. They fit culturally in the troops that fought alongside you, sir, in Vietnam. They fit fine enough to be killed in Korea.<sup>218</sup>

Senator Moynihan stated that the comments by the other senators amounted to "the most shameful display of nativism I have yet to encounter in 15 years in the Senate."<sup>219</sup> He noted that "[o]ne Senator af-

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for *International Law*, 19 FORDHAM INT'L L.J. 1831, 1831 (1996) (summarizing significant historical events that reflected dramatic political changes in the world, including the collapse of the former Soviet Union).

215. See Martin Tolchin, *Moynihan Tries to Save Puerto Rico Referendum*, N.Y. TIMES, Feb. 22, 1991, at A18.

216. *Id.*

217. See 137 CONG. REC. 3962 (1991) (statement of Sen. Moynihan). Senator Moynihan also noted:

[The people of Puerto Rico] sure as hell belong in the gulf, the Persian Gulf . . . as they were in Korea. I do not take any pleasure in citing competitive statistics about whose State had the most persons killed or wounded . . . But let no one doubt that high on each of those lists has been Puerto Rico.

....  
... I cannot believe that we will not give the right of self-determination, a right pledged by President after President, pledged before the world, the United Nations . . . . I can imagine it being reported by the Communist-controlled media, from Havana and elsewhere, that the United States is denying people the right of self-determination. And why? Because of their language and their color, sir.

*Id.* at 3962-63.

218. *Id.* at 3962.

219. *Id.* Unfortunately, Senator Moynihan later apologized for his frankness. See *id.* at 7183.

ter another took occasion to say he was not sure Puerto Ricans belong in American society."<sup>220</sup> Later, criticizing the Committee of Energy and Natural Resources for failing to provide a process for a plebiscite, Senator Moynihan noted that his colleagues used Puerto Rico's culture and language as an excuse for their inaction.<sup>221</sup>

Media coverage addressing the congressional debate similarly reported that only three of the nineteen members of the Senate Energy and Natural Resources Committee reviewing the issue expressed support for the plebiscite.<sup>222</sup> Several members of Congress opposed any law that might provide for a plebiscite because "if such a bill passes, Congress could be forced to make Puerto Rico the 51st State."<sup>223</sup>

Many of the representatives displayed an ignorance and racism that one would expect from nineteenth-century politicians, but perhaps not from world leaders of this century. While in the early 1900s the nativistic disdain of congressional leaders for the people of Puerto Rico was more explicit, that same disdain, albeit thinly veiled, was apparent in Congress almost a century later. For instance, in 1909 Representative Atterson Rucker expressed concern regarding an association with Puerto Rico because the people were the result of "an unreadable genealogical tree" and because "[t]he production of children, especially of the dark color, is largely on the increase."<sup>224</sup> Almost a hundred years later, in 1991 Senator Don Nickles reportedly stated that Puerto Ricans might not "blend" with the United States if they choose statehood.<sup>225</sup> During that same period, Senator Wendell Ford was more explicit in his disdain for the prospect of the Puerto Rican people joining America, reportedly noting that "[s]eparate cultures everywhere are demanding their independent status."<sup>226</sup> Whereas in 1917 Senator Kimble Vardaman expressed an objection to allowing Puerto Ricans to become U.S. citizens,<sup>227</sup> Senator Malcolm

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220. *Id.* at 3962.

221. *See id.* at 7183.

222. *See* Martin Tolchin, *Prospects Dim on Bill for Puerto Rico Referendum*, N.Y. TIMES, Feb. 21, 1991, at B7.

223. J. Jennings Moss, *Senators Leery of Puerto Rico as 51st State*, WASH. TIMES, Feb. 21, 1991, at A4.

224. FERNANDEZ, *supra* note 185, at 57.

225. *See* Editorial, *America's Captive Nation*, N.Y. TIMES, Feb. 22, 1991, at A28. Other senators, likewise, expressed little interest in allowing for a plebiscite. Senator Ford reportedly said, "Let Puerto Rico make a decision, and vote and petition us, and then we'll decide whether to accept them." Tolchin, *supra* note 222, at B7. Likewise, Senator Kent Conrad did not favor statehood for Puerto Rico believing it "could create a situation similar to the French-speaking Quebec province's attempts to leave Canada." Moss, *supra* note 223, at A4.

226. Tolchin, *supra* note 222, at B7.

227. *See* 54 CONG. REC. 2250 (1917) (remarks of Sen. Vardaman).

Wallop in 1991 was purportedly "all for letting Puerto Ricans hold a referendum as long as Congress can ignore the results."<sup>228</sup>

The *New York Times* editorial from 1991 that addressed the above xenophobic statements aptly noted:

These are wounding arguments. Cultural, ethnic and religious differences were once cited by bigots who opposed statehood for Hawaii, New Mexico, Utah and Oklahoma. Nobody spoke of a "separate culture" when Puerto Ricans were drafted to fight in past wars. Nobody says the 15,000 Puerto Ricans serving in the Persian Gulf now do not "blend in."<sup>229</sup>

Other senators expressed class-based concerns over whether to accept the impoverished Puerto Rican people, which is how the Senators perceived them. Senator Nickles asked, "What kind of marriage would this be . . . . Would Puerto Rico blend in?"<sup>230</sup> He suggested that "the island's high poverty rate and the likelihood that current capped Federal welfare payments would soar under statehood."<sup>231</sup>

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228. Editorial, *supra* note 225, at A28.

229. *Id.*

230. Bill McAllister, *Puerto Rico Referendum Killed; Senate Panel Rejects Plan to Let Islanders Vote on Political Status*, WASH. POST, Feb. 28, 1991, at A6 (quoting Sen. Nickles).

231. *Id.* Several other senators promoted a non-binding plebiscite. See Editorial, *supra* note 225, at A28. Not all senators were as uncaring. Senator Paul Simon championed the cause of the people of Puerto Rico, demanding their right of self-determination. He stated that "[f]or the United States to continue to ignore the wishes of the people of Puerto Rico and tolerate second-class citizenship for them is simply not acceptable." 137 CONG. REC. 6387 (1991). "Eventually, commonwealth status will go, just as other forms of colonialism around the world have gone. Puerto Rico will either become a state or become independent. That decision should be up to the people of Puerto Rico." *Id.* at 6388 (statement of Sen. Simon). Senator Simon also noted that the United States has historically supported and stood for self-determination, and yet it "has failed to apply self-determination to the status of Puerto Rico." *Id.* at 6947.

In 1991 Richard Thornburgh, the Attorney General under President Bush's administration, testified before the Senate Energy and Natural Resources Committee and argued against commonwealth status. The Attorney General cited to the United States Constitution's Territorial Clause, reportedly to suggest that Puerto Rico is nothing but a colony of the United States. See Gov. Rafael Hernández Colón, Letter to the Editor, *Puerto Rico Will Choose, Despite White House*, N.Y. TIMES, Feb. 21, 1991, at A20, reprinted in 137 CONG. REC. 3964 (1991) (introduced by Sen. Moynihan).

Interest groups expressed similar concerns over the cost of incorporation. For instance, a recent executive memorandum of the Heritage Foundation opined that statehood could significantly alter the future political and economic course of America. If Puerto Rico is elevated to statehood, its elected representatives in Congress will be more likely to favor further expansion of entitlement benefits . . . . Before further action is taken, supporters of H.R. 856 [a referendum] should be asked to identify for the American public the budget cuts necessary to offset the multibillion dollar impact of this legislation.

Robert DePosada, Executive Memorandum No. 495 from Robert DePosada, Smith Fairfield, Inc. to the Heritage Foundation (Oct. 2, 1997) (on file with the Heritage Foundation, Wash., D.C.).



Due to congressional inaction from 1989 to 1993, the Puerto Rican legislature passed legislation on the 1993 local plebiscite.<sup>232</sup> When referring to a similar plebiscite proposed in 1991, one commentator noted that "it verges on the dishonorable to invite Puerto Ricans to hold a referendum without assurance that Congress will heed the results . . . ."<sup>233</sup> Yet that is exactly what occurred. Congress by inaction refused to be involved in the process and dismissed the results of the 1993 plebiscite, which left Puerto Rico with its colonial dilemma.<sup>234</sup>

In 1996, responding to the 1993 plebiscite, Representative Don Young of Alaska introduced the United States-Puerto Rico Political Status Act,<sup>235</sup> which is the latest United States effort to address Puerto Ricans' second-class citizenship status. With this effort, nearly 100 years after the initial conquest, Congress was still attempting to impose its nativistic requirements on the people of Puerto Rico by including an English-only language requirement in the bill.<sup>236</sup> In its original form, this requirement threatened the plebiscite process proposed by the bill because the people of Puerto Rico take pride in their culture and the importance of the Spanish language to that culture.<sup>237</sup>

With respect to the English-only requirement, several proponents of the bill insisted that English be the exclusive language of instruction in public schools in Puerto Rico should Puerto Rico become a state.<sup>238</sup> This requirement was pressed notwithstanding a CRS legal opinion that such a requirement "would not withstand even the low-

232. See H.R. REP. NO. 105-131, at 20-21 (1997) ("Following a failed attempt by Congress in 1991 to approve legislation to enable the people to exercise the right of self-determination regarding their political status, a plebiscite to enable the residents of Puerto Rico to express their preferences on the status question was conducted by the local government under Puerto Rican law on November 14, 1993.").

233. Editorial, *supra* note 225, at A28.

234. See FERNANDEZ, *supra* note 185, at 261.

235. See H.R. 3024, 104th Cong. (1996) (current version at H.R. 856, 105th Cong. (1998)) (providing a process leading to full self-government for Puerto Rico).

236. See H.R. 3024, 104th Cong. § 4(a)(2)(g) (1996) (requiring the proposed sovereign state of Puerto Rico to adhere to "the same language requirement of the several States").

237. See *No Se Quiere Cambio en el Status Político*, NÚEVO DÍA, Aug. 12, 1997, at 4 [hereinafter NÚEVO DÍA] ("La encuesta de *El Nuevo Día* . . . indica que aunque los puertorriqueños aceptan que bajo la estadidad habrá de lograrse mejoras económicas, cualquier entusiasmo que pueda suscitar el progreso material se desvanece con las 'desventajas emocionales' que consideran traería aparejada en el idioma, la cultura y en la pérdida de símbolos de las nacionalidad, cuya preservación inspira un hondo sentimiento patrio." ("The *El Nuevo Día* survey . . . indicates that even though Puerto Ricans accept that under statehood many economic improvements will be achieved, any enthusiasm provoked by the thought of material progress vanishes due to the 'emotional disadvantages' that they consider will occur in connection with the language, the culture, and in the loss of national symbols, of which their preservation inspires a deep-rooted and sentimental expression of their national heritage.")); see also CARR, *supra* note 74, at 297, 335-36; FERNANDEZ, *supra* note 185, at 219.

238. See 142 CONG. REC. E1829-04 (daily ed. Sept. 30, 1996) (statement of Rep. Young).

est standard of constitutional scrutiny. . . ."<sup>239</sup> The CRS opinion correctly relied on *Coyle v. Smith*,<sup>240</sup> which held that Congress's power to admit a new state to the Union does not include a power to impose upon a new state, as a condition to its admission, restrictions that render the new state unequal to the other states.<sup>241</sup> Because there is no similar English language requirement in the states, the English-only requirement constituted an unconstitutional restriction.<sup>242</sup> Representative Young correctly characterized the English-only requirement: "Here we were faced with a proposal to impose on the U.S. citizens of Puerto Rico . . . a requirement that Congress has never imposed on any other State."<sup>243</sup> Representative Young poignantly observed:

It is bad enough that U.S. citizens residing in Puerto Rico do not have equal rights under the current territorial clause status. To suggest that inequality would continue if Congress admits Puerto Rico as a state is something to which the sponsors of this legislation would not be a party.<sup>244</sup>

Highlighting the alien-citizen paradox, Representative Young noted, "Only the current status leaves the residents of Puerto Rico, with their current less-than-equal statutory citizenship rights and impermanent political status, vulnerable to the broad discretion of a future Congress."<sup>245</sup> Representative Young subsequently introduced a new bill to provide Congress with the opportunity to correctly address the English-only issue in the future.<sup>246</sup> Thus, even when Congress is purportedly attempting to end the century-long colonial relationship, Congress's nativist and xenophobic fears continue to threaten the process that may lead to freedom and full acceptance for the people of Puerto Rico.<sup>247</sup>

#### IV. THE EXPLANATION FOR THE PUERTO RICAN ALIEN-CITIZENS

While probably not the exclusive reason, the alien-citizen status stems in no small part from the United States' historical obsession

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239. *Id.* at E1830.

240. 221 U.S. 559 (1911).

241. *See id.* at 575-76.

242. *See* 142 CONG. REC. E1830 (daily ed. Sept. 30, 1996) (statement of Rep. Young).

243. *Id.*

244. *Id.*

245. *Id.*

246. *See id.* The most recent version of the bill provides that if statehood is granted, "[o]fficial English language requirements of the Federal Government apply in Puerto Rico to the same extent as Federal law requires throughout the United States." United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. § 3(b) (1998).

247. On March 4, 1998, the House of Representatives passed H.R. 856 by one vote, 209-208. *See* Bob Edwards, *Congress Approves Puerto Rico Vote*, ASSOCIATED PRESS, Mar. 5, 1998, available in 1998 WL 7392786.

with remaining Anglo and with social Darwinism.<sup>248</sup> While social Darwinism served to justify the U.S. acquisition of distant lands and their indigenous peoples,<sup>249</sup> the U.S. obsession with remaining white and English-speaking justified the United States' failure to fully accept the people acquired as a result of that imperialistic expansion. This century-old problem explains why the Puerto Rican people are part of America yet lack the rights of other U.S. citizens. A review of the "alien" status of almost four million loyal U.S. citizens who are, for the most part, an amalgam of Spanish, African, and indigenous cultures, leads to an unflattering analysis of the United States' colonial past.<sup>250</sup>

#### A. *The Vision of a White, English-Speaking America*

The origins of the alien-citizen paradox stem from the Anglo-Saxon vision of America first expressed by the founding fathers and subsequently followed in both federal legislation and Supreme Court decisions.<sup>251</sup> It was this vision of a white America, coupled with the "white man's right" to expand that legitimized America's growth without compelling America to add to the list of those who would become members of the body politic.<sup>252</sup> In 1788 John Jay noted in *The Federalist* Number 2, "Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs . . . ."<sup>253</sup> Similarly, Benjamin Franklin, expressing concern over the influx of Germans, other Europeans, and Africans, cautioned against the darkening of the "lovely White and

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248. Social Darwinism, the application of Darwinism to the study of human society, posits that certain groups achieve advantage over others due to biological or genetic superiority and has been used as an ideological justification for the elitist social structures of various Western countries. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 178-80 (1951).

249. Ramos, *supra* note 114, at 289.

250. While military service is not the only means to demonstrate loyalty, this category is a popular one in the United States. The honorable tradition of the Puerto Rican people's military service is one of many facts of which many Americans are largely unaware. The Puerto Rican people have served this country heroically since 1899. During World War I, 18,000 served, often defending vital strategic installations. Over 65,000 Puerto Ricans served in World War II. Puerto Rico had more soldiers in the Korean conflict than 20 states and suffered more injuries per capita than any state. The 270 Puerto Rican combat deaths in Vietnam placed Puerto Rico ahead of at least 14 states and territories. See 137 CONG. REC. 6388 (1991) (statement of Sen. Simon).

251. See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 972 (1995).

252. See Ramos, *supra* note 114, at 285.

253. *THE FEDERALIST* NO. 2, at 91 (John Jay) (Isaac Kramnick ed., 1988).

Red complexion of the English in America."<sup>254</sup> Referring to a growing foreign-born population in his home state, Franklin declared, "[W]hy should the *Palatine Boors* be suffered to swarm into our Settlements and, by herding together, establish their Language and Manners to the Exclusion of ours? Why should *Pennsylvania*, founded by the *English*, become a Colony of *Aliens* . . . ."<sup>255</sup>

Not unlike John Jay and Benjamin Franklin, Thomas Jefferson opined:

[I]t is impossible not to look forward to distant times, when our rapid multiplication will expand itself . . . [and] cover the whole northern, if not the southern continent, with a people speaking the same language, governed in similar forms, [and] by similar laws; *nor can we contemplate with satisfaction either blot or mixture on that surface.*<sup>256</sup>

This sort of bias did not end with the mere expressions of bigoted opinion; it manifested itself for over 100 years through national citizenship law. In an effort to restrict citizenship on the basis of race, the 1790 Naturalization Act<sup>257</sup> established a regime to determine whether one could become a citizen and limited naturalization to "any alien, *being a free white person* who shall have resided within the limits and under the jurisdiction of the United States for the term of two years."<sup>258</sup> In interpreting this provision, the Supreme Court of California observed "persons of the Mongolian race are not entitled to be admitted as citizens of the United States."<sup>259</sup> "Until 1870, only a 'free white person' could be naturalized."<sup>260</sup> It was only after the Civil War that Congress added to those who may be naturalized "persons of African descent."<sup>261</sup>

While such a naked display of prejudice in a federal statute governing citizenship might appear unbelievable in light of modern liberal thought, it was not until 1952 that other non-whites could be naturalized.<sup>262</sup> In his book *White by Law*, Ian Haney-López studied

254. Perea, *supra* note 251, at 973 (quoting Benjamin Franklin, *Observations Concerning the Increase of Mankind, Peopling of Countries, Etc.*, in 3 THE WRITINGS OF BENJAMIN FRANKLIN 63, 73 (Albert H. Smyth ed., 1905) (1751)).

255. *Id.* at 973 (quoting Franklin, *supra* note 254, at 72).

256. Perea, *supra* note 251, at 974 (quoting Letter from Thomas Jefferson to James Monroe (Nov. 24, 1801), in THOMAS JEFFERSON: WRITINGS 1096-97 (Merrill D. Peterson ed., 1984)). Professor Perea observed that Jefferson's references to "blot[s]" and "mixture" related to Africans. *See id.*

257. *See* Act of Mar. 26, 1790, ch.3, 1 Stat. 103 (1790).

258. *Id.* (emphasis added).

259. *In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890).

260. Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521, 531 (1994) (citing *Ozawa v. United States*, 260 U.S. 178, 192-93 (1922)).

261. *See Ozawa*, 260 U.S. at 192-93.

262. *See* IAN F. HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (1996).

United States naturalization laws from 1790 to 1952, the period when only "white" and African-descended immigrants were allowed by law to be naturalized as citizens.<sup>263</sup> As Haney-López aptly illustrated, these racially restrictive laws narrowed the type of people who could immigrate to the United States, thereby shaping "the pool of physical features now present in this country . . ."<sup>264</sup> At least one writer suggests that this country's immigration policy has promoted a form of eugenics.<sup>265</sup> Thus, the great vision of a white America, which many would argue still permeates federal policy in the immigration field, had its beginnings in the genesis of the United States.

The opposition to the admission of New Mexico, Hawaii, and Alaska into the Union further illustrates the American fear of non-white, non-English speakers. For instance, despite efforts beginning in 1850, New Mexico did not become a state until 1912 when a majority of its population was English-speaking for the first time.<sup>266</sup> The principal objection to its admission to statehood was prejudice against the Spanish language and the Spanish and Mexican heritage of the New Mexicans.<sup>267</sup> This opposition to the admission of New Mexico was led by the Chairman of the Senate Committee on Territories, Senator Albert Beveridge.<sup>268</sup> After visiting New Mexico with several members of a subcommittee, Senator Beveridge and his counterparts declared that New Mexico's "character was 'un-American,' that is, the inhabitants were not English-speaking Anglo-Saxons."<sup>269</sup> Resembling the current focus in Congress concerning the status of Puerto Rico, the Senate committee that studied possible statehood for New Mexico ignored the economic and social prerequisites for statehood but concentrated almost exclusively on the use of Spanish in the courts, in the schools, by families, and in the streets.<sup>270</sup> The committee ascertained that "English was still a foreign language for the mass of the population and declared that New Mexico could become a state if its population, as a result of domestic immigration, became thoroughly cultured."<sup>271</sup>

While many non-race related arguments against New Mexico's admission were used against other western territories, they were

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263. *See id.*

264. *Id.* at 116-17.

265. *See* Beverly Horsburgh, *Schrödinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 536 (1996).

266. *See* 131 CONG. REC. 8559 (1985).

267. *See* 35 CONG. REC. 5139 (1902).

268. *See* 131 CONG. REC. 8559 (1985) (report by Sen. Kennedy concerning the history of the statehood process).

269. *Id.*

270. *See* HEINZ KLOSS, *THE AMERICAN BILINGUAL TRADITION* 128 (1977).

271. *Id.*

admitted to the union of states in a much shorter time.<sup>272</sup> A CRS memorandum, which was introduced into the record, explained that the reason for the disparate treatment was because:

New Mexico was never considered in the same light as the other territories. The unique population of New Mexico profoundly separated the territory from most of the remainder of the West where Anglo pioneers had slowly filled the frontiers with a fairly homogeneous population of Western European Stock. Nativism in America, sometimes concealed and at other times brought out into the open, was thus the major obstruction to the territory's statehood aspirations.<sup>273</sup>

Likewise, Hawaii was a U.S. territory for over fifty years before it became a state in 1959.<sup>274</sup> Although the Hawaii Territorial Legislature petitioned Congress for statehood for over fifty years, there was considerable opposition to admitting Hawaiians.<sup>275</sup> A 1959 Senate report on Hawaii's annexation admitted that one of the more influential arguments against statehood was that "so-called Caucasians are outnumbered by groups of different ancestry."<sup>276</sup> A 1985 report on the subject confirmed that "the racial composition of the islands, mostly Japanese and Chinese" was used as an impediment to admission to statehood.<sup>277</sup> In his book *The American Bilingual Tradition*, Heinz Kloss observed, "[I]t may be said with some degree of certainty that Hawaii would not have been granted statehood if its inhabitants had not given up their old languages to a large degree, i.e., if they had remained alien not only in their race but also their language."<sup>278</sup> Likewise, a 1985 report by Senator Edward Kennedy observed that opposition to Hawaii's admission arose in no small part due to the racial composition of Hawaii's inhabitants.<sup>279</sup>

Alaska's experience was not very different. Although Russia sold Alaska to the United States in 1867, it did not become a state until 1950.<sup>280</sup> As Kloss observed, it was no accident that statehood was achieved only after the 1950 census had shown a clear majority of white inhabitants.<sup>281</sup> As set forth in this Article, the status question concerning Puerto Rico parallels the xenophobic basis for delaying

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272. See 131 CONG. REC. 8559 (1985).

273. *Id.*

274. See Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 74 (1995).

275. See *id.* at 75.

276. S. REP. NO. 86-80, at 12 (1959), reprinted in 1959 U.S.C.C.A.N. 1346, 1358.

277. 131 CONG. REC. 8559 (1985) (CRS report).

278. KLOSS, *supra* note 270, at 206. The intersection of race and language is a problem that still impedes the Puerto Rican statehood movement.

279. See 131 CONG. REC. 8559 (1985).

280. See KLOSS, *supra* note 270, at 198.

281. See *id.* at 201.

admission of New Mexico, Hawaii, and Alaska into the Union.<sup>282</sup> In some respects, however, impediments imposed on Puerto Rico's admission to statehood are even more onerous. For instance, the English-only requirement is a novel requirement. Representative Young observed, "When Alaska became a state, [the English language] was not a requirement. We had 52 different dialects in Alaska. People speak English. They also speak many other languages. It was not a requirement."<sup>283</sup> In addition, the plebiscite process to determine the status issue in Puerto Rico is considerably more involved than similarly situated territories. Under either the House or the Senate version of the United States Political Status Act, the self-determination process will require three territory-wide elections to be held over the course of more than a decade, and in order for the preferred status option to succeed, it must obtain a majority of the electorate in each election.<sup>284</sup> The plebiscite process for New Mexico, Hawaii, and Alaska contained a much simpler method requiring multiple referenda.<sup>285</sup>

### B. Social Darwinism

Though the precedent had been set for a white, English-speaking America, this vision did not preclude America from acquiring distant lands inhabited by non-English-speaking non-whites.<sup>286</sup> This expansion was based on a form of Social Darwinism or "ideology of expansion."<sup>287</sup> Efren Rivera Ramos described this philosophy as "the ethos of the times, [which] was a certain ingrained notion of an inherent 'right' to expand . . . ."<sup>288</sup> In the eyes of leaders of their times, America

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282. While I object in the most strongest terms to the colonial status for Puerto Rico, as a resident of the mainland who will not be as directly affected as the resident's of the territory by any ultimate decision on its status, I do not believe it is my place to impart my view on the preferred legitimate status option—statehood or independence. Others argue for allowing persons of Puerto Rican ancestry living on the U.S. mainland the right to vote on Puerto Rico's status plebiscites. See Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 160, 166 (1998).

283. 144 CONG. REC. H773 (daily ed. Mar. 4, 1998) (statement of Rep. Young).

284. See H.R. 856, 105th Cong. (1998); S. 472, 105th Cong. (1998). For a more detailed discussion of this process, see Román, *supra* note 62, at 1119.

285. See 131 CONG. REC. S4441-03 (1985) (providing a history of the statehood process); see also Hawaii Statehood Admissions Act, Pub. L. No. 86-3, § 7, 73 Stat. 4, 7-8 (1959) (Hawaii); Alaska Statehood Law, Pub. L. No. 85-508, § 8, 72 Stat. 339, 343-44 (1958) (Alaska); Act of Jan. 6, 1912, 37 Stat. 1723 (1912) (New Mexico).

286. It is difficult to talk about nativism without drawing reference to the demagogic campaign rhetoric of Pat Buchanan and Pete Wilson. See Paul A. Gigot, *Getting the G.O.P. Back to Reagan on Immigration*, WALL ST. J., Jan. 24, 1997, at A14 (characterizing Republicans as anti-immigration); Juan Gonzalez, *Time's Right to Settle P.R. Status*, N.Y. DAILY NEWS, Mar. 3, 1998, at 12 (stating that Buchanan fears Puerto Rico because its citizens do not speak English).

287. Ramos, *supra* note 114, at 289.

288. *Id.* at 285.

was entrusted with "the mission of conducting the political civilization of the modern world,' by taking that civilization 'into those parts of the world inhabited by unpolitical and barbaric races . . .'"<sup>289</sup> This right to expand, a key concept in the ideology of Manifest Destiny, provided the "superior Anglo-Saxon race" the justification to expand its borders throughout the world.<sup>290</sup> Thus, the combination of the framers' vision of whiteness with the mandate to expand under Manifest Destiny gave rise to the alien-citizen paradox, which resulted in preventing the inhabitants of the newly acquired territories from being fully integrated into America.

### C. *Inequality, Imperialism, and the Status Question*

As addressed previously, America's colonial prerogative has inevitably led to the alien-citizen paradox.<sup>291</sup> This paradox can only be eliminated by removing the subordinated status of the Puerto Rican people. Only through the full grant of U.S. citizenship with all the rights that traditionally go with it, or through a grant of independence to Puerto Rico, can these people end their unequal status.

The grant of full U.S. citizenship, however, raises a host of thorny issues concerning the status of the territory. Possibly the most significant right currently unavailable to the people of Puerto Rico is the right to vote for President, Vice President, and for representation in Congress. Under the current colonial regime, not only is the right to vote for national elections unavailable, but further representation in Congress is reflected only through a single non-voting delegate to the House of Representatives. Thus far, full representation in Congress is provided only to the citizens of a state. Full representation in Congress would therefore seem to bring Puerto Rico a step closer to a status resembling statehood—a status that American Congressional leaders have been reluctant to promote for a century.

Nonetheless, the incongruity of unequal citizenship under commonwealth status is apparent when one considers the following questions. How can United States citizens be considered full citizens if they do not have equal rights, if they cannot vote in presidential elections? How can one be an equal citizen if one cannot vote for and attain representation in Congress? Yet, how can one attain representation in Congress without statehood?<sup>292</sup>

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289. *Id.* at 286-87, (quoting JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION 1866-1876*, at ix (1923)).

290. *Id.*; accord *supra* notes 73-77 and accompanying text (discussing the *Insular Cases*).

291. See *supra* Parts IV.A.-B.

292. For these and other reasons the statehood movement in Puerto Rico is not only gaining influence among the electorate, it is gaining support from intellectuals. For instance, at the University of Puerto Rico there is a group that favors "radical statehood." See Edgardo Rodriquez Julia, *Statehood for Puerto Rico?*, MIAMI HERALD, Aug. 2, 1998, at



Thus, if the people of Puerto Rico are to approach equal citizenship, as a first step the incorporated/unincorporated territory distinction of the *Insular Cases* must be overturned. With these changes, Puerto Rico could attain a status more closely resembling statehood. Subsequently, the United States must commit itself to accept Puerto Rico as a state and provide a legitimate process where that status can be achieved. Conversely, if America refuses to fully accept these citizens, the only tenable solution consistent with an unsubordinated status is granting independence to Puerto Rico.

Eric Yamamoto observed that independence can be asserted within dual frameworks.<sup>293</sup> One is cast in terms of rights recognized by the American legal and political systems, i.e. the courts, Congress, and the media.<sup>294</sup> The second is framed within the "transnational moral authority cast in the language of international human rights."<sup>295</sup> This two-pronged approach may be used to initiate the structural change in Puerto Rico to attain autonomy.

The majority of people of Puerto Rico, however, are apparently proud to be American citizens.<sup>296</sup> They have historically expressed their interest in being aligned with the United States.<sup>297</sup> Hence, the only way to change the inferior, unequal citizenship status of the residents of Puerto Rico is to provide for a status option that either America has refused to accept—statehood—or a status that the vast majority of the people of Puerto Rico have rejected—independence. Colonialism and its consequences have left the people with few options. It thus appears that the people will continue in their paradoxical state. They will be hard-pressed to achieve an unsubordinated status when one considers that during the 100 years Puerto Ricans have pursued such status, the United States has refused to end colonial subordination.

#### D. A Question of Hegemony

Related to the question of the territory's status is the question of the Puerto Rican people's apparent acceptance of their unequal status. Supporters of such a position can point to the fact that in all three Puerto Rican referenda on the issue—1952, 1967, and 1993—the commonwealth status option was victorious.<sup>298</sup> This notion of

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L1. They prefer equality under statehood rather than inequality under the current colonial regime—a sort of radical pragmatism. See Radical Statehood Group, *Manifesto* (visited Sept. 22, 1998) <<http://www.geocities.com/CapitolHill/8628/victor.html>>.

293. See Eric K. Yamamoto et al., *Courts And The Cultural Performance: Native Hawaiians' Uncertain Federal And State Law Rights To Sue*, 16 U. HAW. L. REV. 1, 3 (1994).

294. See *id.*

295. *Id.* at 4 (stating that the right to self-determination is an example of such a human right).

296. See H.R. REP. NO. 104-713, pt. 2, at 4 (1996).

297. See *id.*

e commonwealth status option was victorious.<sup>298</sup> This notion of what has been called "colonialism by consent"<sup>299</sup> relates to the cultural hegemony that has been adopted by the Puerto Rican people.<sup>300</sup> According to Antonio Gramsci's theory of hegemony, subordinated groups often unwittingly adopt the dominant culture's perception of reality.<sup>301</sup> In other words, the proletariat, or subordinate group, "wear their chains willingly. Condemned to perceive reality through the conceptual spectacles of the ruling class, they are unable to recognize the nature or extent of their own servitude."<sup>302</sup>

Cultural hegemony, or the unwitting complicity in the maintenance of inequalities, has occurred in certain respects in Puerto Rico and has resulted in the apparent support of colonialism. The people of Puerto Rico voted in favor of the political party and supported the commonwealth status in large part due to the belief that this status would provide the people of Puerto Rico with enhanced rights.<sup>303</sup> The manifestations of hegemony in Puerto Rico arise from the following facts: first, the people have always been ruled by a colonial power; second, the people and their leaders have embraced the goal of economic and political benefits from some sort of formal association with the United States; and third, influential Puerto Rican leaders, such as Luis Muñoz Marín, mistakenly believed that the commonwealth status would eventually evolve into a unique form of autonomy for the Puerto Rican people.<sup>304</sup>

In any event, while hegemony has played a role in the status question, the people of Puerto Rico have always sought enhanced rights and have never fully accepted their subordinated status.<sup>305</sup> In the 1951 referendum, the Puerto Rican people favored greater local autonomy and enhanced rights under a commonwealth status over the only other choice—naked colonialism.<sup>306</sup> In the 1967 referendum, the people favored an enhanced commonwealth status, which purportedly would have solidified their relationship with the United States.<sup>307</sup> In the 1993 referendum, forty-nine percent of the electorate opted for an enhanced commonwealth status that would have provided a U.S. citizenship equivalent to a birthright or a naturalized

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298. See FERNANDEZ, *supra* note 185, at 221, 261.

299. Aleinikoff, *supra* note 106, at 33.

300. See Román, *supra* note 62, at 1174.

301. See generally T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AMER. HIST. REV. 567 (1985).

302. JOSEPH V. FEMIA, *POLITICAL THOUGHT* 31 (1981).

303. For a more expansive discussion of the role of hegemony in Puerto Rico's colonial predicament, see Román, *supra* note 62, at 1176-1205.

304. See *id.* at 1176-87.

305. See *id.*

306. See *id.* at 1153.

307. H.R. REP. NO. 104-713, pt. 2, at 4 (1996).

citizenship status.<sup>308</sup> Another forty-six percent of the electorate voted for statehood.<sup>309</sup> Thus, the majority of Puerto Rican people in all three nationwide referenda have sought closer association with the United States and also greater citizenship rights.

### *E. Other Social Considerations*

While hegemony may help explain why the status quo is still in place, other emotional factors weigh heavily in the status debate. The Puerto Rican people have historically feared that statehood would result in a loss of the Puerto Rican culture.<sup>310</sup> Given the expression of congressional xenophobia discussed in the Article, as well as policies to assimilate Puerto Rico, there is little to dispel this fear. For instance, a recent poll conducted in the territory demonstrates that while the economic advantages of statehood are known, these benefits do not outweigh the importance of cultural symbolism, such as the Spanish language and nationalistic icons supporting Puerto Rican patriotism.<sup>311</sup>

Support for the commonwealth status is weakest—only thirty-eight percent—among the college educated, which is consistent with the belief that the college educated are in a better position to assess critiques of the status.<sup>312</sup> Partly for this reason, support for the commonwealth status is inversely related to income: fifty-two percent of those who earn less than \$5000 a year prefer no change in the status, but only thirty-eight percent of those earning more than \$20,000 a year prefer the status quo.<sup>313</sup>

While it may appear that tangible economic benefits of statehood should prevail in a territory whose median income is less than half of the poorest state in the Union, cultural pride, particularly among the poor who are not as well educated, is strong.<sup>314</sup> As a result, the debate over status, as it manifests in popular culture, turns on issues that to an outsider may appear mundane. Nevertheless, to the people of Puerto Rico, these issues are central to identity. Some of these “important” cultural issues are evidenced in questions such as whether the territory will be represented in the Miss Universe Contest, or whether Puerto Rico will be represented in the Olympics.<sup>315</sup> This sort of emotional rhetoric has been used by commonwealth supporters or

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308. See *id.* at 18.

309. See *id.*

310. See NUEVO DÍA, *supra* note 237, at 4.

311. See *id.*

312. See *id.*

313. See *id.*

314. See, e.g., 144 CONG. REC. H829-30 (daily ed. Mar. 4, 1998) (statement by Rep. Guterrez) (“If Puerto Ricans are pushed to vote in favor of statehood, they are going to lose one of their most treasured traditions of representation in the sports arena.”).

315. See NUEVO DÍA, *supra* note 237, at 4.

statehood opponents to characterize the issues as ones not of equality, freedom, and prosperity, but of cultural pride under the dominion of a colonial regime.<sup>316</sup>

## V. FOREIGNNESS AND LATINO/LATINA INVISIBILITY

While the alien-citizen paradox has existed for a century, few in legal or other circles are addressing this problem. Historically, Latinos/Latinas have been members of excluded groups. Several writers have addressed the label of "outsider" placed on Latinos/Latinas, Asian Americans, and other non-whites.<sup>317</sup> For instance, sociologist Julian Samora has referred to Latinos/Latinas in general as the forgotten Americans.<sup>318</sup> Similarly, Juan Perea has described Latinos as "invisible" features of the American landscape.<sup>319</sup> Perea observed that Latino invisibility stems from, among other things, the absence of public recognition and portrayal, and from the attribution of "a false and stigmatizing foreignness."<sup>320</sup>

Neil Gotanda, in his groundbreaking work concerning "the Miss Saigon Syndrome"<sup>321</sup> alluded to this notion of "foreignness" in what he terms the "other non-whites dualism."<sup>322</sup> General discussions of race in legal literature had previously focused upon African-American and white bipolar racial relations.<sup>323</sup> This black-white paradigm failed to adequately address the issue of the racism faced by Latinos/Latinas, Asian Americans, Arab Americans, and other non-black racial minorities.<sup>324</sup>

The traditional black-white discourse concerning race simply fails to adequately address the unique form of racism faced by other non-whites. In the black-white paradigm, if a person is not white, then

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316. See Román, *supra* note 62, at 1153.

317. See generally *LA RAZA: FORGOTTEN AMERICANS* (Julian Samora ed., 1966) (analyzing the status of the people with Spanish heritage in the southwestern United States) [hereinafter *LA RAZA*]; GEORGE I. SANCHEZ, *FORGOTTEN PEOPLE: A STUDY OF NEW MEXICANS* (rev. ed. 1967) (studying the social and economic conditions of the people with Spanish heritage in New Mexico); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) (addressing the need for Asian-American legal scholarship).

318. See generally *LA RAZA*, *supra* note 317.

319. Perea, *supra* note 251, at 966.

320. *Id.*

321. Neil Gotanda, *Asian-American Rights and the "Miss Saigon Syndrome,"* in *ASIAN AMERICANS AND THE SUPREME COURT* 1087 (Hyung-Chan Kim ed., 1992) (observing that the controversy concerning the race of the lead character of the play is typical of past and current marginalization of Asian Americans).

322. *Id.* at 1045.

323. See *id.* at 1090.

324. In fact, the multi-level conception of race or racial stratification that is apparent when addressing these other non-whites raises distinctly different legal issues of race and consequently a unique form of racism. See *id.* at 1096.

that person is socially regarded as an "outsider."<sup>325</sup> In the alien-citizen model, in addition to a black-white racial classification, there is a presumption of "foreignness," irrespective of actual citizenship.<sup>326</sup> Not unlike Gotanda's characterization of foreignness, Ian Haney-López's work on the construction of race recognizes that race constructions for other non-whites can contain a foreign component.<sup>327</sup> Haney-López noted that "U.S. Anglos" stigmatized Mexicans by their race and nationality.<sup>328</sup> To the American whites, a Mexican was not only Latin American, he or she could also be black.<sup>329</sup> In the same vein, Kevin Johnson eloquently noted, "Race relations always has [sic] been much more complicated than the black-white dichotomy would suggest. The long history of subordination of . . . other minorities in the United States demonstrates the unfortunate richness of racial subordination in this country."<sup>330</sup> Johnson observed that the "complexity of race relations in the modern United States increases exponentially once one recognizes the racial diversity in society as a whole. . . . and such complexities often are missed by the black-white focus."<sup>331</sup> Likewise, Juan Perea argued that "[f]or too long, the real ethnic complexity of American society has been submerged, hidden by a discussion that counts only race as important and only black or white as race. What of the rest of us, neither black nor white, not fitting neatly into either category?"<sup>332</sup>

As these writers demonstrate, the black-white racial paradigm excludes other minorities and their issues. Thus, if one is to do justice to the complexity of race relations in America, one should acknowledge that the issue goes beyond the traditional black-white paradigm. Unfortunately, until recently that sort of exclusion was the norm in traditional race relations discourse in the United States. When issues of particular importance to Latinos/Latinas have been addressed in any fashion, these issues were all too often framed within the black-white paradigm.<sup>333</sup> Consequently, issues of particular or unique importance to Latinos/Latinas took "a back seat to demands of other racial minorities, particularly African Americans."<sup>334</sup> Even in significant civil rights debates, Latinos/Latinas were either

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325. See *id.*

326. See *id.*

327. See Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27-28 (1994).

328. See *id.* at 28.

329. See *id.*

330. Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 111 (1997).

331. *Id.*

332. Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 571 (1995).

333. See Johnson, *supra* note 330, at 110; Perea, *supra* note 332, at 572-73.

334. Johnson, *supra* note 330, at 106.

forgotten or clumped together with other minorities, who at times have different concerns or priorities.<sup>335</sup>

In the past, the story of the people of Puerto Rico fell squarely within this traditional relegation. This Article attempts to end this invisibility<sup>336</sup> and specifically seeks to bring to light how the people of Puerto Rico have not been made part of the American political community. Indeed, despite being U.S. citizens for almost a century, few in America recognize or acknowledge the second-class citizenship status of the Puerto Rican people. During the course of the century-long colonial relationship, the people of Puerto Rico have repeatedly been denied equal citizenship rights and have been relegated to the inferior alien caste.<sup>337</sup> As non-whites, the Puerto Rican people have faced the intersection of racial and ethnic-based discrimination. They have faced racial discrimination because they are of mixed African, Arawak Indian, and European blood, which simply made them not white enough for equal citizenship status. They have faced ethnic-based bias<sup>338</sup> largely because of their different language and culture. These people of color reside in a distant land in the Caribbean, and they speak Spanish. These two characteristics alone may have been enough to make them too foreign under American scrutiny.<sup>339</sup> As was the problem in Hawaii prior to the adoption of the English-language, the people of Puerto Rico remain *alien* "not only in their race but also their language."<sup>340</sup>

## VI. CONCLUSION

The ideal of equality is at the center of America's self-conception, and equal citizenship is at the core of that ideal. As Karst noted,

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335. See Perea, *supra* note 251, at 967-70.

336. Popular culture recently hit the nail on the head. In an episode of the *X Files*, after two Mexican immigrants contracted a disease from outer space, Agent Scully asked Agent Mulder why these two aliens, who were deformed by the disease, would not be discovered. Mulder explained that "aliens" are invisible, and people do not see them because people do not care to see them. See *X Files: El Mundo Gira* (Fox television broadcast, Jan. 12, 1997).

337. But see *Gonzalez v. Williams*, 192 U.S. 1, 15-16 (1904) (holding that the people of Puerto Rico are not aliens under U.S. immigration law).

338. Ethnicity refers to physical and cultural characteristics that make a social group distinctive, either in group members' eyes or in the view of outsiders. Ethnicity consists of a set of ethnic traits that includes but is not limited to, race, national origin, ancestry, and language. See Perea, *supra* note 251, at 983. What we consider ethnic traits are those traits that we can perceive, not the "often imperceptible fact of national origin." *Id.* at 983-84. It is the perception of differences, often based on visible ethnic traits, that results in discrimination. See *id.* The Puerto Rican language and culture are perceptible traits that could lead to discrimination.

339. The people of Puerto Rico also face the paradox of racial categorization that depends on skin color, perceptions concerning ancestry, and language. Thus, it appears that U.S. perceptions of foreignness themselves do not inevitably lead to a conclusion of racial distinctiveness.

340. See KLOSS, *supra* note 270, at 206.

"The chief citizenship value is respect; the chief harm against which the principle guards is degradation or the imposition of stigma."<sup>341</sup> It is "the denial of equal status, the treatment of someone as an inferior, that causes stigmatic harm."<sup>342</sup> The people of Puerto Rico are separate and unequal.<sup>343</sup> They have subordinated rights, are treated as separate from the rest of the body politic, and consequently have been stigmatized.

Despite the U.S. conquest of the territory, Puerto Rico became a formal part of the United States political scheme only through novel legal fictions. Under U.S. Supreme Court precedent, Puerto Rico was declared an unincorporated U.S. territory, which means "belonging to . . . but not a part of the United States . . ."<sup>344</sup> With this proclamation, the Supreme Court sanctioned the discriminatory treatment of the inhabitants of the United States' colonial acquisitions. Congress later named Puerto Rico a commonwealth, but all along it has been a possession—a colony of the United States.<sup>345</sup> As such, the territory is under the plenary power of Congress under the jurisdiction of the Territorial Clause of the U.S. Constitution.<sup>346</sup>

As other works on the colonial nature of this relationship have demonstrated, the United States, the self-professed leader of the free world, has refused for 100 years to fully accept or free nearly four million people of color that make up part of its empire.<sup>347</sup> Though eventually being granted a form of citizenship, when the issue turned to fully incorporating the people of Puerto Rico into the American political community, America subordinated legal principles of citizenship and their significance to social inclusion in an effort to retain a perceived Anglo-Saxon national identity.<sup>348</sup> In other words, the construction of race has determined the Puerto Rican people's economic prospects, permeated their politics, altered their electoral boundaries, shaped their disbursement of federal funds, and fueled the creation and collapse of political alliances.<sup>349</sup>

341. Karst, *supra* note 23, at 248.

342. *Id.*

343. See TORRUELLA, *supra* note 118, at 267-68 (concluding that by allowing differential treatment of Puerto Rican citizens, the *Insular Cases* create a separate and unequal status for the Puerto Ricans).

344. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

345. See Román, *supra* note 62, at 1206.

346. See U.S. CONST., art. IV, § 3, cl. 2.

347. See CABRANES, *supra* note 51, at 4-6; González, *supra* note 69, at 323-31; Román, *supra* note 62, at 1121 n.6; Jesús G. Román, Comment, *Does International Law Govern Puerto Rico's November 1993 Plebiscite?*, 8 LA RAZA L.J. 98, 103-16 (1995). The United States-Puerto Rico relationship also illustrates how the Puerto Rican people's race has been socially constructed and has changed depending upon the circumstances. See Haney-López, *supra* note 327, at 27-28.

348. See Drimmer, *supra* note 43, at 668-69.

349. See Haney-López, *supra* note 327, at 30.

The question then remains: why has the United States, with all its power, its equally important vision of greatness, and its integral role in declaring the need for people to be emancipated, refused to fully incorporate Puerto Rico and its people? While there are no easy conclusions that can be drawn from this question—and obviously prejudice is not the exclusive reason for America's failure—some observations are in order. Although after a century of colonization some feelings of moral obligation may arise, that obligation has never been sufficient for America to make millions of native Spanish-speaking people of color citizens of the fifty-first state. In fact, recent developments may make the goal of full incorporation and equal citizenship unlikely, particularly given the United States' current fiscal woes.<sup>350</sup>

Over the course of a century, when the issue of fully incorporating the Puerto Rican people into the American body politic arose, fears were expressed from Congress to the Supreme Court concerning the color and culture of the Puerto Rican people. But if equality is not merely rhetoric for the dominant culture to profess, and is indeed a moral axiom, then the United States must end the Puerto Rican people's alien-citizen status.

The United States, through the United States-Puerto Rico Political Status Act, or through some similar vehicle, must initiate a process that will end these people's subordinated status. This process must lead to the full attainment of self-determination for the Puerto Rican people. Only through statehood or independence can an equal and unsubordinated status be achieved.

While statehood is an option, it may be an illusory one. Over a period of 100 years, the United States has essentially rejected the Puerto Rican people. From using words such as "unreadable genealogical tree" in 1901<sup>351</sup> to the not-so-thinly veiled but equally bigoted words as "blend" or "separate culture" in 1991,<sup>352</sup> the message is the same. In an era of "English-only" language requirements and Proposition 187,<sup>353</sup> the United States is arguably even more intolerant of people of color who speak a different language. It is therefore unlikely that the United States will soon accept four million voters, who

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350. The chances of adding a state that may raise government entitlements over \$3 billion a year are remote at best. See Aleinikoff, *supra* note 106, at 21-22 (citing General Accounting Office, *Puerto Rico: Update of Selected Information: Report to Senate Committee on Energy and Natural Resources*, GAO/HRD-89-104FS (Aug. 9, 1989), in 3 *PUERTO RICO: POLITICAL STATUS REFERENDUM 1989-1991*, at 215-21 (P.R. Fed. Affairs Admin. ed., 1992) (discussing the recent economic history of Puerto Rico and its implications for statehood).

351. FERNANDEZ, *supra* note 185, at 57.

352. See, e.g., Editorial, *supra* note 225, at A28; Tolchin, *supra* note 222, at B7.

353. Proposition 187, a California referendum passed in 1994, denies various social services to illegal aliens in the state, and faces numerous state and federal court challenges to its constitutionality. See John Boudreau, *Effort to Outlaw Affirmative Action Promoted in California*, WASH. POST, Dec. 27, 1994, at A3.



happen to be non-English speaking and non-white. The United States-Puerto Rico colonial relationship, therefore, further establishes that racism has been a powerful ideology of the United States' imperialistic policies.<sup>354</sup>

Despite the recent efforts in Congress to create a plebiscite process purportedly to resolve the Puerto Rican status problem, the United States has an ugly and largely ignored history of racist and nativist practice. In an era when the United States no longer views Puerto Rico as strategically important, it is questionable whether the United States will ever free or fully incorporate the people of Puerto Rico and end their alien-citizen status.<sup>355</sup> Ron Teehan, a resident of Guam, who is active in the Chamorro rights movement, may as well have been speaking of Puerto Rico when he declared: "The giant taught us the principles of democracy . . . when do we get to practice them?"<sup>356</sup>

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354. See ARENDT, *supra* note 248, at 158 (finding that, with regard to the imperialist policies of Western countries, "[r]acism has been the powerful ideology of imperialistic policies since the turn of our century").

355. While I hope that I will be proven wrong, I venture to guess that neither H.R. 856, 105th Cong. (1998), nor S. 472, 105th Cong. (1997), will ever become law.

356. Doug J. Swanson & Ed Timms, *American Empire: The Territories; Islands Scarred by Colonial Legacy, Years of U.S. Neglect*, DALLAS MORNING NEWS, Sept. 9, 1990, at M1.

